Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

92-2026

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VISTA PAINT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

The government brought a civil penalty action under the Clean Air Act against a paint company. For lack of subject matter jurisdiction, the court granted government pleading motions and struck the company's defenses relating to the invalidity under state law of the state regulations which were being federally enforced. Thereafter, the district court granted a summary judgment in favor of the government, even though the government had incorrectly moved to enforce a repealed version of the Act. On rehearing, which was conducted under the current and correct version of the Act, the court accepted new evidence and argument submitted by the government, and made amendments to its prior ruling, as proposed by the government, but refused to consider the company's contentions on the same new issues. As a result of these rulings, the company never had a hearing on its invalidity defenses, nor on the issues raised under the new Act. The questions presented here are these:

1. Does Section 307 of the Act divest a district court of subject matter jurisdiction in a civil penalty action to entertain the defense of invalidity of the regulations being enforced on the ground they had originally been adopted in violation of state law?

2. Does the Due Process Clause of the Fifth Amendment of the Constitution prohibit a one-sided rehearing of a defective summary judgment in which the court accepts evidence and arguments of the prevailing party on new issues, and the judgment is modified in an effort to cure the prior defects, but refuses to consider the contentions of the losing party on the same issues?

RULE 29.1 LIST

Petitioner Vista Paint Corporation has no parent company nor any non-wholly owned subsidiary.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Background	4
B. The Earlier Repealed Regulations	5
C. The Subsequent Regulations and Pre-NOV Sales	6
D. Interim and Post-Deadline Sales	7
E. EPA's Information Request And Vista's Response	8
F. EPA's Penalty Policy And USA's Penalty Target	10
G. The Pleading Order	10
H. The Summary Judgment And Its Amendment on Rehearing	12
I. Affirmance Of The Pleading Order	16
J. Affirmance Of The Amended Summary Judgment	17

TABLE OF CONTENTS—Continued

	Page
REASONS FOR GRANTING THE WRIT	18
I. THE MEMORANDUM'S AFFIRMANCE OF THE PLEADING ORDER CONFLICTS WITH THE MAJORITY RULE OF OTHER CIRCUITS HOLDING THAT SECTION 307 OF THE ACT IS NO BAR TO INVALIDITY DEFENSES IN ENFORCEMENT ACTIONS	18
II. THE MEMORANDUM'S AFFIRMANCE OF THE AMENDED SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT WHERE A REHEARING IS HELD ON NEW ISSUES BOTH PARTIES ARE ENTITLED TO A HEARING THEREON	20
III. THE MEMORANDUM DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases Page

Adickes v. Kress & Co., 398 U.S. 144 (1970) 13
American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 7
Armstrong v. Manzo, 380 U.S. 545 (1965) 21, 23
Bell v. Burson, 402 U.S. 535 (1971) 22
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973) 18
Colusa Air Pollution Control District v. Superior Court, 226 Cal. App. 3d 880 (1991) 6
Delaney v. EPA, 898 F.2d 687, (9th Cir. 1990) 12
Dunn-Edwards Corp. v. Bay Area Air Quality Management District, 9 Cal.App. 4th 644 (1992) 11
Gaspard & Co., Inc. v. Government of Guam, 427 F.2d 276 (9th Cir. 1970) 15
General Motors Corp. v. U.S., 496 U.S. 530 7
Getty Oil Co. (Eastern Operations) v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972) 19
Goleta Valley Community Hospital v. Department of Health Services, 149 Cal. App. 3d 1124 (1983) 11
Indiana & Michigan Electric Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) 18
Landy v. Federal Aviation Administration, 635 F.2d 143 (2nd Cir. 1981) 13
Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885 (8th Cir. 1977) 18
New Mexico Environmental Imp. Div. v. Thomas, 789 F.2d 825 (10th Cir. 1986) 19
People v. Cellotex Corp., 516 F. Supp. 716 (C.D. Ill. 1981) 19
Saunders v. Shaw, 244 U.S. 317 (1917) 20, 22, 23
Sierra Club v. Indiana-Kentucky Electric Corp, 716 F.2d 1145 (7th Cir. 1983) 19
Southern Railway Co. v. Miller, 285 F.2d 202 (6th Cir. 1960) 13
Union Electric Co. v. EPA, 427 U.S. 246 19
Union Electric Co. v. EPA, 593 F.2d 299 (8th Cir. 1979) 18

TABLE OF AUTHORITIES—Continued

Page

U.S. v. Chevron U.S.A., Inc., 639 F. Supp. 770 (W.D. Tex. 1985) 13, 14
U.S. v. Ford Motor Co., 814 F.2d 1099 (6th Cir. 1987) 19
U.S. v. Louisiana-Pacific Corp., 682 F. Supp. 1122 (D. Colo. 1987) 14
U.S. v. Reserve Mining Co., 412 F. Supp. 705 (D. Minn. 1976) 15
U.S. v. SCM Corp., 667 F. Supp. 1110 (D. Md. 1987) 13, 14
U.S. v. CPS Chemical Co., Inc., 779 F. Supp. 437 (E.D. Ark. 1991) 18
U.S. v. Interlake, Inc., 429 F. Supp. 193 (N.D. Ill. 1977) 18
U.S. v. Zimmer Paper Products, Inc., 733 F. Supp. 1265 (S.D. Ind. 1989) 18
Western Oil & Gas Assn. v. ARB, 37 Cal. 3d 502 (1984) 11
Western Oil & Gas Assn. v. Orange County Air Pollution Control District, 14 Cal.3d 411 (1975) 11

Statutes

28 U.S.C. § 1254(1) 2
42 U.S.C. § 7410 5
42 U.S.C. § 7413(e) 3, 12, 13, 14, 15, 16
42 U.S.C. § 7511b(e) 5
42 U.S.C. § 7607 ..... 2, 3, 18, 19, 24
Clean Air Act, 42 U.S.C. § 7607(b) 2, 17, 20
Former 42 U.S.C. § 101(a)(3) 5
Section 307(d)(8) 3, 20
Section 307(d)(1)(B) 2, 16, 20

United States Constitution

Fifth Amendment 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vista Paint Corporation ("Vista") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit (the "Memorandum"), reproduced as Appendix A, was not reported. The Order denying the appellees' petition for rehearing on penalty issues is reproduced as Appendix G. The Order denying Vista's petition for rehearing on liability issues and rejecting its suggestion for rehearing *en banc* is reproduced

as Appendx H. The rulings of the United States District Court for the Central District of California, reproduced as Appendices B through F, were not reported.

JURISDICTION

The Opinion was filed and judgment entered on September 24, 1992. The Order denying Vista's petition and suggestion was filed on March 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, as follows: "No person shall . . . be deprived of . . . property without due process of law."

Section 307(b)(1) of the Clean Air Act (the "Act"), 42 U.S.C. § 7607(b) (as amended November 15, 1980), provides, in relevant part, as follows:

> "(1) A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval or action appears in the Federal Register . . .
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil proceedings for enforcement. . . ."

Section 307(d)(1)(B) of the Act, 42 U.S.C. § 7607 (d)(1)(B), provides, in relevant part, as follows:

> "This subsection applies to . . . the promulgation or revision of an implementation plan by the Ad-

ministrator under section 7410(c) of this title . . . The provisions of . . . section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies . . ."

Section 307(d)(8) of the Act, 42 U.S.C. § 7607 (d)(8), provides, in relevant part, as follows:

"The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule."

Section 113(e) of the Act, 42 U.S.C. § 7413(e) (as amended November 15, 1990), provides, in relevant part, as follows:

"(1) In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with . . . actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

"(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) . . . of this section . . ., where the Administrator . . . has notified the source of the violation, and the plaintiff makes a prima

facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature."

STATEMENT OF THE CASE

A. Background

Gloss and semi-gloss oil-based enamel house paints contain paint thinner, or mineral spirits. Paint thinner is one of thousands of compounds known to air pollution control regulators as a volatile organic compound ("VOC"). Regulators call such enamels "non-flat" coatings. VOCs, including those from non-flat paints, can contribute to the formation of ground-level ozone in certain urban areas on hot summer days. The control of emissions of VOC and other ozone precursors has been a central focus under the Act. Traditional enamels contain 380 or more grams per liter ("g/l") of VOC.

This case arises out of a jurisdictional dispute between California clean air regulators, on the one hand, and federal regulators, on the other, over the wisdom of regulations imposing a 250 g/l limit on VOCs in non-flat coatings, and over the proper time to implement any such limit in California's urban areas. Such a limit effectively outlaws traditional oil-based enamels. State and local officials had fixed an effective date at September 1, 1985, but later extended that deadline several years. The California paint industry, including Vista complied with the amended deadline. Federal officials, however, later contended that the earlier deadline, although it had been

repealed at the state level, remained federally enforceable.

The Act, as in effect in the 1980s, provided that control of air pollution was the primary responsibility of state and local government. Former 42 U.S.C. § 101 (a)(3). It also provided that nothing in the Act shall preclude or deny the right of state and local government to adopt or enforce any requirement respecting control or abatement of air pollution. *Id.* at § 116.[1] Under the California Health and Safety Code (the "Code") regulating certain non-vehicular sources of air pollution was the primary responsibility of local and regional districts, including respondents South Coast Air Quality Management District ("SCAQMD") and San Diego Pollution Control District ("SDAPCD"). Code §§ 39002, 40001. The Act directed each state to adopt a state implementation plan ("SIP") consisting, in part, of current district rules. 42 U.S.C. § 7410. Respondent California Air Resources Board ("ARB") approved local rules as SIP revisions. Code §§ 39602, 40460-46469.5, 41500-41507, 41600-41652. The Act required respondent Environmental Protection Agency ("EPA") to approve any SIP revision meeting certain requirements. Former 42 U.S.C. §§ 7410(a)(3)(A).

B. The Earlier Repealed Regulations

On March 16, 1984 SCAQMD adopted the ninth version (in seven years) of its Rule 1113. Section (a)(1) thereof provided, in relevant part, as follows:

> A person shall not sell, offer for sale, or apply any architectural coating . . . which:
>
> "(A) contains more than 250 grams of volatile organic compounds per liter of coating . . . or

---

[1] These provisions substantially survived the November 15, 1990 amendments to the Act. But now EPA, in addition, has certain direct responsibility over paints and other consumer or commercial products. 42 U.S.C. § 7511b(e).

> "(B) contains more than 380 grams of volatile organic compounds per liter of coating . . ., is defined as non-flat coating, and is manufactured prior to September 2, 1985 . . . ."

At the same time SDAPCD adopted a revised version of its similar Rule 67.0. Section (d)(2) thereof provided, in pertinent part, as follows:

> ". . . [A] person shall not sell, offer for sale, or apply any nonflat architectural coating having, at the time of sale or manufacture, a volatile organic compound content . . . in excess of the following:
>
> (i) 380 grams of volatile organic compounds per liter of coating if manufactured . . . prior to September 1, 1985.
>
> (ii) 250 grams of volatile organic compounds per liter of coating if manufactured on or after September 1, 1985. . . ."

Each of SCAQMD and SDAPCD submitted its 1984 rule version to ARB as a SIP revision, and ARB approved each.[2] EPA approved both, along with those of numerous other districts, as SIP revisions on January 24, 1985. 50 Fed. Reg. 3338 (Jan. 24, 1985).

C. The Subsequent Regulations and Pre-NOV Sales

In August, 1985 SCAQMD once more amended Rule 1113 by extending the September, 1985 effective date of the anticipated 380-to-250 g/l limit reduction to September, 1989. SDAPCD also took actions extending its September, 1985 deadline permitting sales of non-flat coatings through August 31, 1987. These and other district deadline extensions were submitted to, and approved by, ARB. They were then submitted to EPA. At all times during 1985, 1986, and 1987, however, EPA delayed taking action thereon.

---

[2] As shown below, there were substantial doubts as to the validity of these district adoptions and state approvals under California law. See *Colusa Air Pollution Control District v. Superior Court*, 226 Cal. App. 3d 880, 883-84 (1991).

At various unspecified times between December 3, 1985 and June 24, 1987 Vista and at least 39 other leading California paint manufacturers and retailers offered and sold traditional enamels in SCAQMD, SDAPCD, and throughout California. These products met the 380 g/l limit required in California. No sales were made by Vista on any holidays or Sundays.

At all times during December 1985, 1986, and the first eight months of 1987, SCAQMD and SDAPCD permitted the sale of such enamels. The California paint industry sold such coatings openly and in the belief that such actions were fully proper. At all such times air quality regulators at the local, state, and federal levels were aware of this widespread understanding and practice, and never expressed to members of the paint industry, including Vista, any opinion that the understanding was wrong or that the practice should stop. At all such times the paint industry, based on the advice of counsel, understood that EPA was without authority to enforce the locally superseded, but federally approved, SIP revisions.[3]

D. Interim and Post-Deadline Sales

On June 24, 1987 EPA sent a notice of violation ("NOV") to the 40 leading California paint companies, including Vista, charging violation of one or more of 20 federally approved local district rules. The Vista NOV issued under former Section 113 of the Act, charged that Vista had failed to comply with the superceded versions of SDAPCD Rule 67.0 and SCAQMD Rule 1113, and alleged that Vista was in violation of the applicable SIP.

---

[3] See *American Cyanamid Co. v. EPA*, 810 F.2d, 493, 500 (5th Cir. 1987); but also see *General Motors Corp. v. U.S.*, 496 U.S. 530, 541 (1990).

EPA advised the paint industry that it would pursue enforcement action against any company which did not comply with the following schedule:

> "1) Manufacture of non-compliant (>250 g/l) coatings is ceased on or before June 30, 1987, and
>
> "2) Sales of non-compliant coatings is ceased on or before August 31, 1987."

In order to meet the terms of the first part of EPA's "amnesty," Vista totally stopped manufacturing all traditional enamels by July 1, 1987. Between June 24 and August 31, 1987 Vista attempted to sell off its obsolete inventory of such coatings. Vista totally stopped all sales in SCAQMD by September 1, 1987.

Based on discussions with EPA and SDAPCD Vista filed a variance application with SDAPCD on August 31, 1987, and attempted to liquidate its obsolete inventory of traditional enamels in SDAPCD during September, 1987, believing that such conduct was permitted as a result of the variance proceeding. Approximately 70 gallons of traditional enamel were sold by Vista in SDAPCD during the post-deadline period.[4]

At all times during 1987 and thereafter the SIP revisions adopted by various districts and approved by ARB in 1985 remained pending before EPA. EPA did not act thereon until February 2, 1989, when they were disapproved. 54 Fed. Reg. 5236 (Feb. 2, 1989).

E. EPA's Information Request And Vista's Response.

On June 19, 1987 EPA had sent to Vista and the 39 other paint companies letters asking for certain future sales data about non-flat coatings, including the volume

---

[4] USA contends, and the judgment holds, that these few post-deadline sales in SDAPCD justify massive penalties with respect to the pre-deadline sales and sales in SCAQMD as well.

which will have been sold in each day of August, September, and October 1987. A report was due on each of six different dates between August 28, 1987 and November 16, 1987. EPA's letter stated that, in the event Vista failed to adequately respond, it intended to pursue "immediate" action in court.

On July 22, 1987, by which time Vista had stopped manufacturing non-flat coatings, EPA sent a second letter containing certain "modifications" to its June 19 information request. That letter, among other things, provided that the August 1987 data could be given by stipulation. It further said:

> ". . . The stipulation must also verify that by July 1, 1987, your company ceased manufacture of these coatings for sale in the 20 districts and that your company intends to cease all sales and offers for sale of these coatings in the 20 districts by September 1, 1987."

On August 4, 1987 Vista sent a letter to EPA making the latter stipulations.

Vista understood that, if manufacturing and selling stopped, no further reporting was required. For these reasons, Vista delivered no sales data to EPA on the six dates. At all times it believed that it had complied with what EPA finally wanted, and it never willfully withheld anything. EPA pursued no "immediate" court action pursuant to EPA's June 19 letter.

Indeed, at no time prior to May 11, 1989 did EPA say anything to Vista about the 1987 information request. On that date, however, respondent United States of America ("USA") wrote to Vista asserting for the first time that Vista had failed to provide the information requested in 1987. Promptly after receipt of that letter Vista took extraordinary steps to provide the sales data. Three Vista employees spent six days reviewing sales tickets in order to determine the estimated sales in

SDAPCD in September 1987. The information was delivered to USA on June 19, 21, and 23, 1989.

On June 23, 1989 USA wrote a letter to Vista. It stated that USA had received from Vista "enough information" to permit it to resolve the matter. At no time thereafter did EPA request more information.

F. EPA's Penalty Policy And USA's Penalty Target

EPA had promulgated and published its Civil Penalty Policy. BNA Environmental Reporter (Federal Laws) 41:2991 (June 1, 1984). This policy set forth in detail the criteria and methodology to be followed by USA in fixing its penalty "target" in a civil enforcement action.

In its June 23, 1989 letter USA also revealed to Vista that it had "calculated a proposed civil penalty of $192,000 based on EPA's Clean Air Act penalty policy." USA calculated its penalty target for paint sales during the pre-NOV interim, and post-deadline periods at $162,000. The major factor in that calculation was the following: "Assuming a sale price of $15 a gallon, and a 2% profit margin, the economic benefit of the unlawful sales was $72,000." USA's June 23, 1989 letter also calculated its proposed penalty target of $30,000 for its information request claim based on the following: "Importance (§ 114 violation): $15,000," to which USA added: "100% upward adjustment for knowing violation and lack of cooperation."

G. The Pleading Order

On December 3, 1990, more than two weeks after the new amendments to the Act took effect, USA, at the request of the EPA, filed a complaint for civil penalties against Vista for alleged violations of the Act relating to the paint sales and to the requests for information.

Vista filed its answer to the complaint on March 28, 1991 asserting various affirmative defenses. As one de-

fense, Vista alleged that in promulgating the 1984 versions of Rule 67.0 and Rule 1113, SDAPCD and SCAQMD had violated, among other things, the provisions of the Code relating to rulemaking,[5] and applicable California statutes mandating environmental impact analysis.[6] As a result of these and other state law violations, Vista alleged, each rule was void *ab initio*[7] and could not be approved by EPA nor enforced by USA. Vista also alleged as affirmative defenses that, in approving the 1984 versions of Rule 67.0 and Rule 1113, ARB violated the above provisions, as well as California's administrative procedure act.[8] As a result, ARB's inclusion of each of Rule 67.0 and Rule 1113 in the SIP was void *ab initio* and EPA could not have approved nor enforced either.[9]

---

[5] Under the Code, as in effect in 1984, each district was required to assess and duly consider the economic impacts of the rules. *Western Oil & Gas Assn. v. ARB*, 37 Cal. 3d 502, 507 (1984). Also, a district had no authority to regulate sources not within its statutory jurisdiction. *Western Oil & Gas Assn. v. Orange County Air Pollution Control District*, 14 Cal.3d 411, 415-17 (1975). (The Code was silent about paint until 1988, and even now it is unclear what district authority to regulate paint may be. Code § 41712.)

[6] A district rule regulating the VOC content of house paint is invalid where the district fails to analyze the adverse environmental effects of the use of substitute products in place of the outlawed coatings. *Dunn-Edwards Corp. v. Bay Area Air Quality Management District*, 9 Cal.App. 4th 644, 653-58 (1992).

[7] *Dunn-Edwards*, 9 Cal. App. 4th at 655.

[8] California Government Code § 11340 et seq.; see, *e.g.*, *Goleta Valley Community Hospital v. Department of Health Services*, 149 Cal. App. 3d 1124, 1128-29 (1983).

[9] Vista further alleged that, in approving the superseded version of Rule 67.0 and Rule 1113 as part of the federally approved SIP, EPA violated various provisions of federal law, including the Act, as a result of which EPA's approvals were also void and unenforceable.

Vista concurrently filed a counterclaim for declaratory and injunctive relief against USA raising the same defenses. It also filed a third-party complaint against SCAQMD, SCAPCD, ARB, and EPA alleging, *inter alia*, that the rules USA sought to enforce in the main action had been illegally adopted or approved by SCAQMD, SDAPCD and ARB and were therefore void *ab initio*, as a matter of state law, and unapprovable and unenforceable at the federal level.

On July 24, 1991 the district court granted the third-party defendants' motion to dismiss the third-party complaint, and USA's motion to dismiss Vista's counterclaim and to strike Vista's affirmative defenses challenging the underlying validity of the rules. The court's order stated, among other things, that it lacked subject matter jurisdiction to review the claims raised in the counterclaim and third-party complaint.

H. The Summary Judgment And Its Amendment on Rehearing

On October 25, 1991 USA moved for summary judgment.[10] USA's summary judgment motion was based exclusively, and improperly, on former Section 113(b) of the Act. Former 42 U.S.C. § 7413(b). USA totally ignored the dispositive provision, new Section 113(e) of the Act. 42 U.S.C. § 7413(e).

For example, as to liability for paint sales, USA's brief cited Sections "7413(b)(1)" and "7413(b)(2)" of the former Act. USA presented no evidence nor argument relating to new Section 113(e)(2). That section establishes, first, that the days of violation should only include the day of the NOV and days "thereafter." Second, it provides that, as to the post-NOV period, there

---

[10] USA sought a civil penalty of $6,040,000. Neither USA nor EPA has ever purported to explain why it departed from its $192,000 "target" fixed under EPA's civil penalty policy. See *Delaney v. EPA*, 898 F.2d 687, 693 (9th Cir. 1990).

was no liability for "intervening days" during which no sales occurred.[11]

As another example, USA's summary judgment papers, as to liability for information request responses, cited sections "7414(a)(1)" and "7413(b) . . . (4)" of the former Act. EPA offered no evidence nor briefing relating to the second sentence of new Section 113(e)(1) of the Act, in effect since November 1990, which provides that the court shall not assess penalties where the responding party had "sufficient cause" to fail to comply with the requirement.

As a final example, insofar as penalty factors are concerned, EPA incorrectly cited former Section "7413(b)." It attempted no factual nor legal showing under the relevant provision, the first sentence of new Section 113(e)(1), which mandates that "the court . . . shall take into consideration" various factors, including "the economic benefit of non-compliance."

USA submitted to the court proposed findings of fact and conclusions of law. They contained no references to the above new statutory provisions and elements.[12]

The district curt granted summary judgment and signed *verbatim* USA's proposed findings and conclusions on November 18, 1991. The court ruled that Vista had sold traditional enamels unlawfully each and every day between December 3, 1985 and October 12, 1987, including during the pre-NOV period and on every Sunday

[11] USA bore the burden of proving at trial each day of violation. *U.S. v. Chevron U.S.A., Inc.*, 639 F. Supp. 770, 777 (W.D. Tex. 1985); *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1124-25 (D. Md. 1987); *Landy v. Federal Aviation Administration*, 635 F.2d 143, 147 (2nd Cir. 1981). Section 113(e) imposes certain modifications as to post-NOV violations. But those modifications do not apply retroactively to the sales here. *Southern Railway Co. v. Miller*, 285 F.2d 202, 204-05 (6th Cir. 1960).

[12] Because USA's showing was wholly deficient, Vista was not bound to make a counter-showing on the unaddressed issues. *Adickes v. Kress & Co.*, 398 U.S. 144, 155-56 (1970).

and holiday. The court further ruled that Vista had unlawfully failed to respond to EPA's request for information on each and every day between August 26, 1987 and November 18, 1991 (the day of the summary judgment hearing), including all days after June 23, 1989 when USA had written that it had received from Vista "enough information." [13]

In subsequent proceedings both parties asked the district court to amend the ruling, in one way or another, based on consideration of the new but previously unheard sections of the Act. On rehearing, both sides presented evidence and argument on these issues for the first time, and both sides asked the court for amended, although differing, findings of fact and conclusions of law with respect thereto. See Federal Rules of Civil Procedure, Rules 52, 59, 60.

On the paint sale liability issue, for example, Vista argued that there is no such liability for pre-NOV sales under new Section 113(e)(2) of the new Act, and asked the court for a conclusion of law stating that "[n]o liability exists for paint sales prior to the notice of violation." Vista also put in evidence showing that no sales occurred on Sundays or holidays, and asked for a finding to that effect.

On the issue of liability for failure to respond to information requests, Vista presented evidence showing, that, as a result of Vista's earlier document production, USA had written on June 23, 1989 that it had "enough information" to meet its enforcement needs. Vista's brief argued that Vista had sufficient cause thereafter to refrain from any further production efforts. Vista sub-

---

[13] The Court cut USA's request in half and awarded a civil penalty of $3,020,000. The penalty below was unprecedented among reported civil penalty cases under the Act, both in the summary manner of its rendition, and in the severity of its confiscatory impact on the defendant's business. Compare, *U.S. v. Chevron U.S.A., Inc.*, 639 F. Supp. 770 (W.D. Tex. 1985); *U.S. v. SCM Corp.*, 667 F. Supp. 1110 (D. Md. 1987); *U.S. v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987).

mitted to the court five proposed findings of fact and one proposed conclusion of law relating to the sufficient cause issue.

On the issue relating to the economic benefit of noncompliance, Vista submitted the above letter in which USA estimated that benefit from the paint sales was "72,000." [14] USA submitted no evidence on rehearing relating to economic benefit. In briefs, its lawyers simply offered an estimate—many times higher than $72,000—based on an assumption, which they conceded was "not precise," that 55% of Vista's income was due to sales of traditional enamels. Vista submitted declarations of its chief executive and chief financial officers showing that USA's lawyers' assumptions were "false," as less than 3% of Vista's income was due to such sales, and that accordingly this estimate was "erroneous," and further showing that both of USA's widely divergent estimates mistakenly failed to account for the offsetting benefits of compliance due to increased sales of substitute products. Vista proposed a new finding of fact to such effect, and another to the effect that it had gained no economic benefit by any delay in providing requested information.

In its brief on rehearing, USA conceded, as follows:

> ". . . Vista correctly states that new Section 113 (e)(1) . . . replaced former Section 113(b) and should apply to this case. . . . [N]ew Section 113 (e)(1) requires consideration of . . . the economic benefit of noncompliance.
>
> ". . . [T]he Court's Findings of Fact and Conclusions of Law should be amended to make a specific conclusion of Law on each additional issue. . . .

---

[14] USA argued, and the district court found, that the letter was inadmissible because it contained a settlement proposal. But USA's factual admissions in the letter were admissible. *Gaspard & Co., Inc. v. Government of Guam*, 427 F.2d 276, 278 (9th Cir. 1970); *U.S. v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976).

> Accordingly, the United States will submit under separate cover an amended proposed Findings of Fact and Conclusions of Law for the Court's consideration."

USA did submit such proposed amended conclusions of law on certain of the new issues. They read, in relevant part, as follows:

> "The CAA was amended in November 1990, in part, to add new CAA Section 113(e)(1). . . . In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider . . . the economic benefit of noncompliance. . . .
>
> "The seventh factor, the economic benefit of noncompliance, also supports a substantial penalty against Vista. By its failure to properly respond to EPA's Section 114 requests for information . . . Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of noncompliant coatings. . . . Vista obtained a significant economic benefit from its illegal offer for sale and sales of non-compliant coatings. . . . Vista has failed to submit admissible evidence to controvert the United States' showing of Vista's significant economic benefit."

On rehearing, the court ruled that Vista's motion was "denied in its entirety with prejudice, except as explicitly set forth below." This followed: "The Court approves and enters amended findings of fact and conclusions of law in the form submitted by the United States."

I. Affirmance Of The Pleading Order

The Ninth Circuit affirmed the pleading order. The Memorandum states (A3), as follows: "As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those

rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third party complaint, the counterclaim, and the affirmative defenses dealing with invalidity."

J. Affirmance Of The Amended Summary Judgment

The Ninth Circuit also upheld the amended summary judgment rendered on rehearing.[15] However, the Memorandum acknowledges (A6) as follows: "The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case." The Memorandum further states (A7) that Vista's failure to make certain arguments during the summary judgment proceeding was "likely due to the failure of the USA to bring its complaint under the 1990 CAA Amendments."

Nevertheless, the Memorandum rules (A11) that one of the issues "raised for the first time in Vista's post-judgment motion" was "Vista's liability for pre-notice of violation sales," and that, "[a]ccordingly, we refuse to consider" Vista's argument on appeal with respect to that issue. It further states (A4): "Vista did not raise the issue that the dates of the sales were not proven for Sundays and holidays until after summary judgment had been entered."

The Memorandum states (A8) that Vista's contention that USA told Vista that USA had "enough information" on June 23, 1989 "was not raised until the post-judgment action." It states (A5) that Vista's argument that it had "sufficient cause" to act as it did thereafter was "only raised in its post-judgment motion." Again, the Memorandum concludes (A11) that, "[a]ccordingly, we refuse to consider these arguments."

As to any economic benefit of noncompliance, the Memorandum acknowledges (A8-9) that "there may have been a factual dispute as to this issue." But it nonetheless

---

[15] It reversed the amended summary judgment on penalty and remanded to the district court for trial thereon.

upheld the district court's conclusion that "Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit." [16]

REASONS FOR GRANTING THE WRIT

I. THE MEMORANDUM'S AFFIRMANCE OF THE PLEADING ORDER CONFLICTS WITH THE MAJORITY RULE OF OTHER CIRCUITS HOLDING THAT SECTION 307 OF THE ACT IS NO BAR TO INVALIDITY DEFENSES IN ENFORCEMENT ACTIONS.

The majority of circuits which have considered the question have held or suggested that the prescriptions of Section 307 of the Act establishing judicial review of actions by the EPA in approval of a SIP do not prevent a party from raising as a defense in an enforcement action premised on a violation of the SIP matters which were not within the ambit of the EPA Administrator's review. *Union Electric Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979) (". . . [A] company seeking to have these issues reviewed . . . could present its cause as a defense to any enforcement proceedings initiated by the EPA in federal district court."); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *U.S. v. CPS Chemical Co., Inc.*, 779 F. Supp. 437, 454 (E.D. Ark. 1991); *U.S. v. Zimmer Paper Products, Inc.*, 733 F. Supp. 1265, 1270 (S.D. Ind. 1989); *U.S. v. Interlake, Inc.*, 429 F. Supp. 193, 197 (N.D. Ill. 1977) ("Thus Section 307 (b)(1) permits a court of appeals to consider only those matters which the Administrator could consider when it was determined whether to adopt a plan pursuant to Section 110(a)(2)"); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973); *Indiana & Michigan Elec-*

---

[16] For the reasons stated at footnote 14 above, any factual admission in USA's letter was admissible. In any case, USA introduced no evidence of benefit, but Vista put in two detailed declarations of its officers rebutting the unsubstantiated assertions of USA's lawyers.

tric Co. v. EPA, 509 F.2d 839, 845 (7th Cir. 1975). Indeed, without addressing the question, this Court has recognized certain such rulings. *Union Electric Co. v. EPA*, 427 U.S. 246, 268 n.18 (1976).

Furthermore, the majority of circuits has concluded that a state or local regulation adopted in violation of state law is void *ab initio* and therefore unapprovable by EPA and unenforceable by USA in an enforcement action. *New Mexico Environmental Imp. Div. v. Thomas*, 789 F.2d 825, 833 (10th Cir. 1986) ("When the approved SIP contains an element that is invalidated by virtue of state law, adoption by the EPA is also invalidated"); *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983); *People v. Celotex Corp.*, 516 F. Supp. 716, 718 (C.D. Ill. 1981).[17]

Conversely, the minority of circuits has suggested that the language of Section 307 bars the raising of the invalidity defense in a federal enforcement action. *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3rd Cir. 1972) ("Getty was posing a direct challenge to the regulation . . . Getty was in the wrong court by virtue of section 307 of the Act").[18]

Further, the minority of circuits has held that a provision included in a state implementation plan which was void and unenforceable under state law may still be enforced in a federal action. *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (". . . [S]uch invalidation cannot be given effect, because invalidation of an EPA-approved SIP may only occur in the federal ap-

[17] "It would be an anomaly, if not a denial of defendant's due process rights, to allow, at this point, full enforcement of those invalid regulations . . . ." 516 F. Supp. at 718.

[18] In discussing the availability of judicial review, however, the court in *Getty* acknowledged: "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." 467 F.2d at 356. Vista never got a hearing on its invalidity defenses.

pellate courts on direct appeal from the Administrator's decision under § 7607(b)(1) . . .").

The Memorandum of the Ninth Circuit here follows, although without specific reference thereto, the minority rule as to both the effect of Section 307 and the federal enforceability of an invalid state regulation.[19] This Court should take this opportunity to resolve the above conflict among the circuits and, Vista would argue, resolve it in favor of the majority view.

II. THE MEMORANDUM'S AFFIRMANCE OF THE AMENDED SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT WHERE A REHEARING IS HELD ON NEW ISSUES BOTH PARTIES ARE ENTITLED TO A HEARING THEREON.

In *Saunders v. Shaw*, 244 U.S. 317 (1917), a landowner sued a drainage district in state court to enjoin collection of a tax. A holder of the district's bonds, which were to be paid out of the proceeds of the tax, intervened to oppose the injunction. At trial the landowner offered evidence to show that his land was outside of the area benefitted by the drainage system. The evidence was excluded, however, as being outside the scope of the landowner's pleadings. Accordingly, the bondholder did not introduce rebuttal evidence. The bondholder prevailed in the trial court. The state appel-

---

[19] The references in the Memorandum to Section 307(b)(1) and 307(d) are misplaced. Section 307(b)(1) relates to review of "action of the Administrator," and Section 307(d) also refers to certain types of action "by the Administrator." Here, the thrust of Vista's defenses relates to the unlawful actions of SCAQMD, SDAPCD, and ARB under state law in adopting and approving the two regulations, rather than to the later actions of EPA in approving them under the Act. Thus, the Memorandum fails to address Vista's central contention when it alludes to Vista's "challenge [to] EPA's approval," as opposed to its challenges to the state action of the state actors.

late court initially affirmed, but on rehearing, reversed and granted the injunction based upon the landowner's offered, but neither admitted nor rebutted, evidence. The bondholder's petition for another rehearing was denied under a state procedural rule forbidding a second rehearing. This Court, in an opinion authored by Justice Holmes, reversed, saying:

> ". . . [The bondholder] has been deprived of due process of law, . . . because the case has been decided against him without his ever having had the proper opportunity to present his evidence. . . . [W]hen the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view . . . [W]e . . . cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." 244 U.S. at 319.

In *Armstrong v. Manzo,* 380 U.S. 545 (1965) a woman's second husband petitioned to adopt her daughter. A state statute dispensed with the need for notice to the natural father when he was in arrears for child support. Relying on this statute, the step-father alleged such default, and the hearing proceeded to judgment in his absence. Upon learning of the adoption decree, the natural father moved to set it aside. At the second hearing, he introduced evidence attempting to show that he had not defaulted in his child support obligations. But the court denied his motion and confirmed its prior adoption decree. This Court reversed. It held that the first hearing violated the due process clause for lack of the required notice and that the second failed to cure that constitutional infirmity. The Court said:

> "Had the petitioner been given the timely notice which the Constitution requires, . . . the moving parties would have had the burden of proving their

case . . . [citation]. It would have been incumbent upon them . . . to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could have prevailed.

"Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . [T]here was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter. . . . The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." [citation] Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

"A fundamental requirement of due process is 'the opportunity to be heard.' [citation] It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." 38 U.S. at 66-67.[20]

In *Saunders*, the defendant could not argue the location issue at the first hearing, because it had been ruled

---

[20] When a statutory scheme makes an element an important factor, the determination ". . . may not, consistently with due process, eliminate consideration of that factor in [the] hearing. The hearing required by the Due Process Clause must be 'meaningful' [citation] and 'appropriate to the nature of the case' [citation]. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." *Bell v. Burson*, 402 U.S. 535, 541-42 (1971).

immaterial. In *Armstrong*, defendant could not meet the default issue, because he was not there. Here, similarly, Vista was not heard on the Section 113(e) issues at the initial summary judgment hearing, because USA had erroneously attempted to litigate issues under the repealed Act and had ignored the real issues raised under the new Act.

In *Saunders*, the defendant was denied any hearing in which to cure the earlier defect. In *Armstrong*, a rehearing was held, but the harm inflicted on the defendant could not be cured, as the burden of proof had in the meantime effectively shifted. In much the same way, in this case, Vista was denied any real opportunity to litigate the new Section 113(e) issues on rehearing, because the proceeding below was wholly one-sided and the Ninth Circuit "refuse[d] to consider" Vista's evidence and arguments relating to those issues on review.

III. THE MEMORANDUM DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

The civil penalty provisions of the Act hold out "draconian" possibilities. *Union Electric*, 427 U.S. at 272 (Powell, J., concurring). The standards imposed under the Act are complex and controversial, and ever more so. Civil liability is fixed pursuant to prosecution which is quasi-criminal in essence, but lacks the normal safeguards afforded to a criminal defendant. The per day maxima are high, and a clean air violation, by its nature, is usually a multiday event. The threat is especially severe, of course, to a small business.[21]

It is essential that a litigant have its day in court on all dispositive issues. Wihout that, its due process right to a fair hearing has been extinguished.

---

[21] Vista had sales of $28,900,000 in its 1986-1987 fiscal year. Its profit during 1990-1991 was $304,567. It employs 400 persons in Southern California.

The pleading order upheld on appeal gutted an essential part of Vista's defense. By it, Vista was denied a hearing on the validity of the very rules USA was so zealously attempting to enforce against it. Mootness, as well as inefficiency, generally render repeated state law challenges to an endless series of local "ghost" rules futile. Further, EPA cannot adjudicate the state law validity issues in the SIP revision approval process, and thus a Section 307 challenge in the Court of Appeals on state law grounds would be similarly useless. The only real opportunity a defendant has to challenge the underlying validity of a superseded, but federally-approved, local rule is when USA attempts to enforce it in a federal enforcement action. This is the only practical rule from the standpoint of judicial economy. The existing split among the circuits relating to the effect of Section 307 on state invalidity defenses in federal enforcement actions should be resolved by this Court. The minority rule applied *sub silentio* in the Memorandum below conflicts directly with the great weigh of authority.

Similarly, USA sought and won a summary judgment in the first motion proceeding which was admittedly defective due to USA's own fundamental error of law. USA acknowledged that the judgment was in need, if possible, of being cured and that necessitated a second hearing. USA attempted the showings required under new Section 113(e) for the first time on rehearing. But because the rehearing conducted in the district court on the new issues, and the review on appeal, was wholly a one-way affair, Vista was effectively denied a hearing on those crucial issues, too.

CONCLUSION

For these reasons, a writ of certiorari should be issued.

Respectfully submitted,

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE
& SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioner

Dated: June 21, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55160

D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

Argued and Submitted August 19, 1992
Pasadena, California

MEMORANDUM*

[Filed Sep. 24, 1992]

Before: TANG and HALL, Circuit Judges, and WALKER,** District Judge.

Vista Paint Corporation ("Vista") appeals from the district court's summary judgment in favor of the government finding Vista liable for violations of the Clean Air Act ("CAA") and awarding the United States ("USA") civil penalties and attorneys fees. Vista also appeals the dismissal of its counterclaims and third-party complaint against the Environmental Protection Agency ("EPA"), California Air Resources Board ("ARB"), South Coast Air Quality Management District ("SCAQMD"), and San Diego Air Pollution Control District ("SDAPCD").

The district court had jurisdiction over the enforcement action pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. §§ 1331, 1345, and 1355. Jurisdiction over the third-party complaint and counterclaim was disputed. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand this action to the district court.

I.

Vista contends that the district court erred in granting motions striking certain of Vista's affirmative defenses and

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim.

A. Invalidity claims and defenses.

As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third-party complaint, the counterclaim, and the affirmative defenses dealing with invalidity.

B. Estoppel claims and defenses.

Assuming that there was jurisdiction over the estoppel claims and defenses, the district court correctly dismissed these claims and defenses for failure to state a claim. Even if the EPA had promised not to exercise its enforcement discretion against those paint manufacturers who ceased sales of non-complying paint by September 1, 1987, and that promise was sufficient to estop EPA, Vista admits that it did not halt the sale of non-complying paint by that date. Accordingly, any "promise" would be inapplicable to Vista and it could not prevail on its estoppel theory as a matter of law.[1] Accordingly, the district court properly dismissed the claims and defenses based on estoppel for failure to state a claim.

II.

Vista also contends that the district court erred in finding that Vista violated the CAA by selling or offering

[1] Vista also argues that USA is estopped due to "EPA's variance representations." However, Vista did not raise this argument until its post-judgment motion. *See infra* Section IV.

for sale non-complying paint, and by refusing to comply with EPA's information request.

A. Paint sale liability.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for selling or offering for sale non-complying paint. Vista was manufacturing, selling and offering for sale non-complying coatings in 1985 when the volatile organic compounds ("VOC") limits became effective. In June 1987, Vista told EPA that it was selling non-complying paint in the SCAQMD and the SDAPCD. In his deposition, Vista's President, Eddie Fischer, admitted that Vista had been violating the rules since 1985 and was doing so before and after September 1, 1987. Vista also admitted that these violations in the SDAPCD continued until October 12, 1987.

Vista did not raise the issue that the dates of the sales were not proved for Sundays and holidays until after summary judgment had been entered. In his declaration in opposition to summary judgment, Fischer denied that Vista offered for sale thousands of gallons of non-complying paint. However, Fischer expressly testified in his deposition that non-complying paint was offered for sale after September 1, 1987, in San Diego. A party may not recant sworn testimony in order to defeat a summary judgment motion. *Juardo v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410 (9th Cir. 1987). Accordingly, as no issue of fact or law remained, summary judgment as to liability for non-complying paint sales was proper.

B. Compliance with information request.

There was no genuine factual dispute precluding summary judgment as to Vista's liability for refusing to comply with EPA's information request. EPA's second information request required Vista to establish and maintain certain records and to submit certain reports. Vista's

President admitted that the kind of information EPA sought was available when EPA requested it. If Vista had stopped offering for sale and selling non-complying paint by September 1, 1987, it would have been relieved of some of the requirements in this request. However, Vista continued to sell such paint after September 1, 1987. Vista's President understood that the requirements of the second request were waived only if Vista stopped selling non-complying paint by September 1, 1987. Although Vista admittedly continued to sell non-complying paint after September 1, 1987, it never provided the information requested by EPA. Accordingly, the court did not err in granting summary judgment as to liability for Vista's refusal to comply with EPA's information request because no issue of fact or law remained.[2]

III.

Vista also contends that the district court erred in summarily awarding civil penalties. Due to the factual nature of many of the factors the district court was required to consider in determining the civil penalty, summary judgment was improper. Section 113(e)(1) of the Clean Air Act requires that:

> In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same

[2] Vista's argument that the EPA had no authority to require the sales data and that it had sufficient cause to act as it did were only raised in its post-judgment motion. *See* Section IV.

> violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C. § 7413(e)(1) (1992 Supp).[3]

A. Section 113(e)(1) factors.

1. economic impact/size of business

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the economic impact of the penalty on Vista's business. The court below specifically noted in its findings:

> Vista is a major manufacturer, distributor and retail seller of paint with its total sales last year exceeding 50 million dollars. . . . Imposition of the penalty assessed below would amount to approximately six percent of Vista's sales in a single year of operation.

In his declaration, Fischer stated that Vista's overall sales for fiscal 1991 were about "$45 million and profits were approximately two million dollars. Since then, sales have been flat but profits have declined." In addition, Fischer declared that "[i]mposition of the fine sought by the government in this case, would result in the destruction of my business and the loss of 400 number of jobs [sic] in the Southern California area." USA contends that Fischer's statements did not give the court any financial information to help the court make its determination. While Vista presented no business records, tax returns, affidavits of accountants to controvert the USA claim that the imposition of the full amount of the penalty would amount to less than eleven percent of Vista's sales in one year, Fischer's declarations raise a genuine issue of materail fact. Accordingly, the court erred in granting summary judgment as to this penalty factor.

---

[3] The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case.

2. full compliance history

The district court held that despite Vista's history of full compliance, a substantial penalty was warranted. As there was no factual dispute, summary judgment as to this factor was proper.

3. good faith efforts to comply

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to its state of mind. A court should be wary of granting summary judgment when good faith is in question. *See White v. Roper,* 901 F.2d 1501, 1503-06 (9th Cir. 1990); *Hotel & Restaurant Employees Union v. Rollison,* 615 F.2d 788, 793 (9th Cir. 1980). In his declaration, Fischer stated that Vista made every attempt to cooperate with the EPA. USA contends that there are no *material* facts in dispute regarding good faith. However, the mere fact that Vista offered for sale and sold non-complying paint after September 1, 1987, does not establish that Vista acted in bad faith.[4] As there was a genuine issue of material fact, sumary judgment was improper as to this factor.

In addition, the court erred in summarily finding that Vista acted in bad faith in failing to respond to the information request. In his declaration, Fischer stated that Vista attempted at all times to cooperate with the government's request. Fischer also stated that three Vista employees spent three days trying to compile the requested

---

[4] At summary judgment, Vista argued that the issue of state of mind was "relevant to the seriousness of any violation." As good faith is irreleavnt as to the seriousness of the violations, the court correctly refused to consider good faith under that factor. Vista did not argue that its state of mind was relevant to its good faith efforts to comply. This error is likely due to the failure of USA to bring its complaint under the 1990 CAA Amendments. As good faith is a factor that the district court was required to consider, summary judgment as to this issue was not proper.

data. There were contested issues of material fact.[5] Vista's good faith was a question of fact that should not have been decided on summary judgment.

4. duration of violation

The district court correctly ruled that the duration of violation supported a substantial penalty. Vista's argument that any violation occurred only on the day of the deadline, but did not continue thereafter, is meritless. The CAA explicitly provides for penalties for each day that Vista fails to respond to an information request. 42 U.S.C. § 7413(b) (1992 Supp).

5. payment of penalties previously assessed

SDAPCD previously assessed a $500 penalty. Vista argues that the court "appears to have given no weight to SDAPCD's evaluation of the proper penalty." This argument is meritless. The district court was not obligated to accept $500 as the proper penalty. The district court considered the $500 Vista paid to the SDAPCD on a fine originally set at $2,000.

6. economic benefit of noncompliance

The district court found that Vista obtained a "significant economic benefit" that supported a "substantial penalty." While there may have been a factual dispute as to this issue, the district court recognized that "Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings." The court also found that

---

[5] Vista's contention that EPA's "promise" that any deficiencies in Vista's responses would excite "immediate" action, and its settlement letter that told Vista that EPA had "enough information to make a settlement offer," led Vista to believe that it had satisfied the information request, was not raised until the post-judgment motion.

Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit. Therefore, summary judgment was proper as to this penalty factor.

7. seriousness of the violation

The court found that the seriousness of the violation supported a substantial penalty. In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effects of its emissions on human health. The only document filed by Vista in opposition to summary judgment was a declaration by Fischer. Vista offered no documentary evidence related to the quantity of paint offered for sale to controvert the government's claims as to the potential health effects of the 13,000 gallons of paint it alleged Vista had offered for sale in San Diego in September 1987. USA contends that its claim was based on Fischer's sworn testimony before the San Diego Hearing Board that he had "13,000 gallons of paint in the San Diego district."

In its opposition, Vista represented that it had only sold 34 gallons of paint in September 1987 in the SDAPCD. But, in his supporting declaration, Fischer estimates that Vista sold at least 70 gallons. Fischer's declaration raises a genuine factual dispute as to the number of gallons offered for sale. Therefore, this element of the seriousness factor was not properly disposed of on summary judgment.

Vista also argues that any delay or lack of completeness in providing the 1987 sales data had no adverse impact on the public. This argument is meritless. EPA's ability to gather information on potential violations is vital to enforcement of the CAA. It is irrelevant that no ozone was formed from Vista's failure to supply the information. *See United States v. Charles George Trucking Co.*, 823 F.2d 685, 689 (1st Cir. 1987) (importance of compliance with information requests).

B. Non-statutory factors.

1. governmental delay

In opposition to summary judgment, Vista asserted that there was a genuine factual dispute as to the effect of EPA's inaction on the district's proposed SIP revisions. In *General Motors Corp. v. United States,* 496 U.S. 530, 541 n.4 (1990), the Supreme Court found that "the statutory remedies for EPA inaction include . . . a request pursuant to § 113(b) . . . for reduction or elimination of penalties during any period in which unreasonable agency delay results in prejudice." *See also United States v. SCM Corp.,* 667 F. Supp. 1110, 1128 (D. Md 1987) (government delay should neither mitigate against imposition of a substantial penalty nor act to enhance the penalty amount). Vista made such a request at summary judgment.

Vista argues that EPA delayed from 1985 to 1987 in notifying the industry that it would attempt to enforce the federally approved, but locally superseded, rules. Vista also argues that the district court failed to properly consider EPA's delay in acting on the proposed SIP revisions and in bringing this action. Vista contends that had the EPA rejected the revisions earlier, it would have made none of the paint sales. The "mere failure by governmental agencies to prosecute . . . does not allow a court to reduce a penalty." *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.,* 913 F.2d 64, 81 (3rd Cir. 1990). EPA is only required to act on revisions of SIPs within a reasonable time, not necessarily within four months. *General Motors Corp.,* 496 U.S. at 536-42. USA contends that the EPA's inaction on the San Diego proposed revision was reasonable as it was submitted less than a month before September 1, 1986. Whether this and the other delays were reasonable was a question of fact that precluded summary judgment as to this factor.

2. unusual and perplexing nature of regulation

Vista did not bring up this argument until its post-judgment motion. Vista cites only *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987), to support its argument that its penalty should have been reduced because of the "unusual and perplexing" nature of the regulatory scheme. Whatever the complexity of the underlying legal basis for EPA's actions, Vista's President was told by EPA and the San Diego District that, if it did not stop selling non-complying paint by September 1, enforcement would follow. There was nothing unusual or perplexing in these instructions to Vista.

3. reliance

This argument was brought forth in Vista's post-judgment motion. The district court was not bound by *Louisiana-Pacific* to consider "justifiable and detrimental reliance." Accordingly, the court did not abuse its discretion in denying the post-judgment motion as to this issue.

IV.

Unfortunately, Vista intertwined the distinct issues addressed on summary judgment with those addressed only in its post-judgment motion.[6] Vista never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, Vista's arguments were, at best, unclear. Vista did not even touch on any of these arguments in its opening brief. Accordingly, we refuse to consider these arguments.

---

[6] After thorough review of the district court record, we conclude that the following issues were raised for the first time in Vista's post-judgment motion: Vista's liability for pre-notice of violation sales, the burden of proof regarding the dates of any sales, abuse of prosecutorial discretion, USA's failure to follow EPA's penalty policy, constitutional excessiveness, EPA's authority to require the sales data, and Vista's sufficient cause to act.

V.

We affirm the district court's decision to grant motions striking certain of Vista's affirmative defenses and dismissing Vista's counterclaims and third-party claims for want of subject matter jurisdiction and for failure to state a claim. We also affirm the district court's summary judgment as to liability, and its denial of Vista's post-judgment motion. However, we reverse the district court's summary judgment as to the civil penalty, and remand to the district court for trial on the penalty issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449(R)

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant,

v.

UNITED STATES OF AMERICA,
Counterdefendant.

VISTA PAINT CORPORATION,
Third Party Plaintiff,

v.

ENVIRONMENTAL PROTECTION AGENCY; CALIFORNIA AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Third Party Defendants.

ORDER DISMISSING DEFENDANT'S COUNTERCLAIM, DISMISSING DEFENDANT'S THIRD PARTY COMPLAINT, AND STRIKING CERTAIN AFFIRMATIVE DEFENSES

[Filed July 23, 1991]

The motion of plaintiff United States of America to dismiss defendant Vista Paint Corporation's counterclaim and to strike certain affirmative defenses in this action, and the motions of the third party defendants, Environmental Protection Agency, California Air Resources Board, Technical Review Group, South Coast Air Quality Management District and San Diego Air Pollution Control District, to dismiss defendant's third party complaint in this action, came on regularly for hearing before this Court on June 17, 1991. Appearing on behalf of the plaintiff United States of America and third party defendant Environmental Protection Agency were Stephen M. Johnson and Peter Hsiao. Appearing on behalf of the third party defendant South Coast Air Quality Management District was Barbara Baird. Appearing on behalf of the third party defendant San Diego Air Pollution Control District was Miriam Milich. Appearing on behalf of the third party defendants Technical Review Group and California Air Resources Board was Norman N. Flette. Appearing on behalf of the defendant and third party plaintiff was William H. Smiland. After considering the moving and opposition papers, the arguments of counsel and all other matters presented to the Court;

IT IS HEREBY ORDERED that:

1. The motions of the third party defendants Environmental Protection Agency, South Coast Air Quality Management District, San Diego Air Pollution Control District, California Air Resources Board and Technical Review Group to dismiss defendant Vista Pain Corporation's third party complaint are granted in their entirety and the third party complaint is dismissed with prejudice with respect to all third party defendants based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the third party complaint;

b. The claims asserted by the defendant in the third party complaint fail to state a claim upon which relief can be granted.

2. Plaintiff United States of America's motion to dismiss defendant's counterclaim is granted in its entirety and the counterclaim is dismissed with prejudice based upon the following grounds:

a. The Court lacks subject matter jurisdiction to review the claims raised in the counterclaim;

b. The claims asserted by the defendant in the counterclaim fail to state a claim upon which relief can be granted;

3. Defendant's First through Sixth, Eighth, Twelfth, Thirteenth, and Fifteenth through Eighteenth purported affirmative defense, inclusive, are stricken in their entirety.

DATED: This 23rd day of June, 1991.

/s/ Manuel L. Real
MANUEL L. REAL
Chief United States District Judge

Submitted by:

LOURDES G. BAIRD
United States Attorney
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao Date 6-21-91
PETER HSIAO
Assistant United States Attorney
Attorneys for Plaintiff United States of America and Third Party Defendant Environmental Protection Agency

PETER M. GREENWALD
District Counsel

/s/ Peter Hsiao/a Barbara Baird Date 6-21-91
BARBARA BAIRD
by telephone authorization
Principal Deputy District Counsel
Attorneys for Third Party Defendant South Coast Air Quality Management District

LLOYD M. HARMON, JR.
County Counsel

/s/ Peter Hsiao/a Miriam Milich Date 6-21-91
MIRIAM MILICH, Deputy
by telephone authorization
Attorneys for Third Party Defendant San Diego Air Pollution Control District

DANIEL E. LUNGREN
Attorney General
R. H. CONNETT
Assistant Attorney General

/s/ Peter Hsiao/a Norman Flette Date 6-21-91
NORMAN N. FLETTE
by telephone authorization
Deputy Attorney General
Attorneys for Third Party Defendants Technical Review Group and California Air Resources Board

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: November 18, 1991
Time: 10:00 a.m.

[Filed Dec. 18, 1991]

The Motion for Summary Judgment brought by plaintiff United States of America came on regularly for hearing on November 18, 1991, Chief United States District Judge Manuel L. Real Judge Presiding. Peter Hsiao, Assistant United States Attorney appeared on behalf of the United States. Robert Newell appeared on behalf of defendant Vista Paint Corporation ("Vista"). After considering the pleadings filed herein, the papers and accompanying documents, declarations and exhibits, and in accordance with Plaintiff's Statement Uncontroverted Facts and Conclusions of Law filed and entered concurrently herewith, and there being no genuine issue of material fact remaining in dispute;

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) The motion for summary judgment brought by plaintiff United States of America is granted in all respects;

(2) Judgment is granted to the United States of America and against defendant Vista for Vista's violation of Section 110 of the Clean Air Act pursuant to 113 of that Act, 42 U.S.C. §§ 7410, 7413, for 578 days. Civil penalties are accordingly assessed against Vista:

(a) for Vista's 468 days of violation from December 3, 1985 up to June 24, 1987 in the amount of $1000.00 per day of violation for a total of $468,000.00; and

(b) for Vista's 110 days of violation from June 24, 1987 to October 12, 1987 in the amount of $12,500.00 per day of violation for a total of $1,375,000.00;

(3) Judgment is granted to the United States of America and against defendant Vista for Vista's violation of Section 114 of the Clean Air Act pursuant to Section 113 of that Act, 42 U.S.C. §§ 7413, 7414, for 1177 days from August 26, 1987 to November 18, 1991, and civil penalties are accordingly assessed against Vista for these violations in addition to the above stated penalties in the amount of $1000.00 per day of violation for a total of $1,177,000.00.

(4) The United States of America is awarded its reasonable attorney fees and expenses for establishing that Vista's responses to the United States' requests for admissions were without a legally justifiable reason. Plaintiff shall submit its declaration establishing its attorney fees and other expenses within twenty-one (21) days of this judgment.

(5) The United States of America is awarded its costs of suit against Vista. The United States shall submit its cost bill within twenty-one (21) days of this Order.

(6) The United States of America is awarded interest at the legally applicable rate of 4.98 per cent as of this date on the entire judgment amount herein, to begin accruing as of the date this judgment is entered.

DATED: This 18th day of Dec., 1991.

/s/ Manuel L. Deal
MANUEL L. DEAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: November 18, 1991
Time: 10:00 a.m.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 18, 1991]

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on September 16, 1991, Chief United States District Court Judge Manuel L. Real presiding. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and defendants, the Court makes the following findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-compliant coatings").

3. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 *et seq.* Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them as state law. *Id.* at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA

with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410, requires among other things that each State submit rules for emission limitations to be incorporated into the State Implementation Plan ("SIP"), and enforced as federal law by the EPA. *See* 42 U.S.C. § 7413.

4. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 1113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

5. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over 10 years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

6. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987 *and* who did not cease their sale of non-compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

7. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114 Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987 to submit their first reports, and warned that non-compliance would subject them to civil penalties.

8. Vista did not respond to EPA's March 19 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(a)(3), 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987 the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

9. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987 by disclosing the VOC content of the architectual coatings it manufactured in February and March 1987, only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May, 1987, and did not provide the requested information.

10. EPA subsequently sought more specific information from the paint manufacturers regarding the trade

name, volume and VOC content of each non-compliant coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

11. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

12. Based upon Vista's admission, EPA issued a Notice of Violation to Vista on June 19, 1987 pursuant to Section 113(a)(1) of the CAA.

13. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings, (2) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July-October 1987.

14. The information requested by EPA's June 19 Section 114 request was available to Vista at the time of EPA's request. EPA again warned Vista at that time of the a $25,000 per day penalty if the requested information was not received.

15. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987 modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

16. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987 letter, and no report as required by EPA's June 19, 1987 letter. 24. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate State air pollution control agency of this enforcement action.

17. On August 19, 1987, Vista's president, Eddie R. Fisher, telephoned William Wruble of EPA Region IX to ask for more time to sell his non-compliant coatings. After discussing Vista's situation, Mr. Fisher stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fisher then stated that "he would (could) litigate if he had to, since the option was to go out of business."

18. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fisher then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

19. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista however continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

20. Further evidence that Vista sold non-compliant coatings after September 1, 1987 is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the

brand name "Proformer", from the same Vista San Diego store on September 22, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

22. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987 report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 340 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fisher further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices of Violations for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

23. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

24. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 *et seq.*, and provides the applicant with a procedure to obtain relief from a *local* rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health and Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that Rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

25. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987 hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24 variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

26. Vista offered for sale a significant amount of non-compliant coatings in San Diego in September 1987. At the SDCAPCD Hearing Board September 24, 1987 hearing, Vista's president testified under oath, as required by Cal. Health & Safety Code § 40830, that 13,000 gallons of non-compliant paint remained in Vista's San Diego stores. Vista's president corroborated this admission when he told SDCAPCD inspector George Seidel prior to the hearing that during September 1987, Vista had 5200 gallons of non-compliant paint for sale in Vista's San Diego stores. Until Vista's variance was lost, Vista continued to offer this paint for sale in violation of the SIP.

27. The VOC's emitted by Vista's paint are a primary percursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶ 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

28. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage. There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are

among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respirator system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

29. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering. Moreover clear evidence shows that ozone damages economically, ecologically, and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity, and in severe cases, individual trees can die.

30. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal Clean Air Act's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice Of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to contiue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

31. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987 and sent to EPA, that represented that

Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

32. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that he cannot recall ever seeing the purported Vista August 4, 1987 letter before 1989 when it was first produced to the U.S. Department of Justice.

33. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

34. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista first specifically identify by September 27, 1991 the quantity of its non-compliant coatings manufactured and sold in 1987, and second produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

35. Vista did not identify its non-compliant coatings with a verified response per this Court's Order and as

required by Section 114 of the Clean Air Act, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

36. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30, 1987. *See* Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

37. Vista sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fisher Depo. p. 188. *But see* Vista RFA No. 27. There are numerous other examples. *See* Vista RFA Nos. 1, 2, 3, 5, 6, 7. *See* especially Vista's evasive response to RFA No. 13, 14.

38. In the only information Vista has ever revealed about its sales of non-compliant paint in September 1987, Vista asserts that after September 1, 1987 it sold 35 gallons of non-compliant paint from one store, the identical store where SDCAPCD inspectors purchased non-compliant Vista paint after September 1, 1987. However Vista has never revealed the total sales of non-compliant paint in all of its San Diego stores after September 1, 1987, and pointedly has continued its pattern of obstruction and evasion in this litigation by refusing to admit even its sales of this 35 gallons of paint. *See* RFA No. 17 and Vista's response.

39. There is no genuine issue of material fact remaining in this case.

40. To the extent that any of the following Conclusions of Law are deemed to be uncontroverted facts, they are incorporated into these Statement of Uncontroverted Facts.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein.

2. Venue in this district is proper pursuant to 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

3. Liability for violations of Sections 101 and 114 of the federal Clean Air Act ("CAA"), 42 U.S.C. §§7410, 7414, is strict, pursuant to CAA Section 113, 42 U.S.C. § 7413.

4. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

5. EPA satisfied the requirement that notice of this action be given to the appropriate State air pollution control agency pursuant to the CAA, 42 U.S.C. § 7413.

6. Vista illegally manufactured, offered for sale and sold non-compliant coatings a VOC content in excess of 250 g/l during the time period between and including December 3, 1985 through October 12, 1987 in violation of the State Implementation Plan rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

7. Vista has therefore violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985 to October 12, 1987, a total of 578 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

8. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987 request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July-October 1987.

9. Vista has therefore violated Sections 113 and 114 of the Clean Air Act from August 26, 1987 to November 18, 1991, a total of 1177 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

10. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer of sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation, and not later when the NOV is issued. This Court will first determine the maximum penalty allowable, and then consider any mitigating circumstances.

11. In determining the civil penalty, the court "should give effect to the major purpose of a civil penalty: deterrence. Civil penalties should be large enough to hurt, and to deter anyone in the future from shown as little concern as [defendant] did for the need to comply.

12. In assessing civil penalties, CAA Section 113 provides that the court shall take into consideration in addition to other factors "the size of the business, the

economic impact of the penalty on the business and the seriousness of the violation." 42 U.S.C. § 7413(b).

13. The first two factors, the size of Vista's business and the economic impact of the penalty on its business, support the imposition of a substantial penalty. Vista is a major manufacturer, distributor and retail seller of paint, with its total sales last year exceeding 50 million dollars. Vista owns its manufacturing facilities in Fullerton, California, its own stores in 15 different locations in California, and its own trucks and transportation facilities for its business operations. Imposition of the penalty assessed below would amount to less than eleven per cent of Vista's sales in a single year of operation.

14. The third factor, the seriousness of the violation, also supports a substantial penalty against Vista. After more than two years of illegally selling non-compliant coatings and after a Notice Of Violation, Vista continued to manufacture and sell its non-compliant coatings at a rate of 11,300 gallons per month. The excess VOC's added to the environment by manufacturing this paint are significant; by applying these non-compliant paints, the excess VOC's added to the environment above that permitted by law is approximately 16,000 lbs., or eight tons a month. During the total period between December 3, 1985, and October 12, 1987, the application of Vista paints has thereby added approximately 176 tons of excess VOC's to the environment over that permitted by law. Given the devastating effects on human health, vegetation and our environment of such unpermitted pollution, the potential harm of Vista's conduct is almost incalculable, where Vista has contributed to the injuries from air pollution suffered by the population of Los Angeles, Orange and San Diego Counties.

15. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S.

Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

16. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

17. Finally, in considering other factors bearing on Vista's penalty, Vista's conduct was calculated to violate the law, and was intentional, knowing, and in bad faith. Moreover, while other paint manufacturers accepted EPA's offer of leniency in exchange for their compliance with the law, Vista literally dared EPA to enforce the law, and then refused to disclose the evidence of its violations. Vista conduct has been consistent throughout this case, and establishes a pattern of knowing disregard for the law. Deterrence of Vista from the knowing, deliberate and calculated violation of the environmental laws requires imposition of these civil penalties.

18. The Court has considered all other mitigating factors, and has reduced Vista's civil penalty accordingly.

19. Regarding Vista's CAA Section 110 violations, the Court assesses a civil penalty of $1,000 per day for each of Vista's 468 days of violations from December 3, 1985 to June 24, 1987 (the date Vista received its Notice of Violation from EPA), and $12,500 per day for each of Vista's 110 days of violation from June 24, 1987 to October 12, 1987. The total CAA Section 110 civil penalty is $1,843,000.

20. Regarding Vista's CAA Section 114 violations, the Court assesses a civil penalty of $1,000 per day for each day of Vista's 1177 days of violation from August 26, 1987, the date Vista's first response to EPA's June 19, 1987 request for information was due, to November 18, 1991, the hearing date on the United States' summary judgment motion. The total CAA Section 114 civil penalty is $1,177,000.

21. In addition, Vista shall be required to pay the reasonable attorney's fees and expenses of the United States pursuant to Federal Rule Of Civil Procedure 37(c) in making its proof of the matters denied in Vista's Responses to Plaintiff's First Set Of Requests For Admissions, dated March 29, 1991, where (a) the requests were not held objectionable pursuant to Rule 36(a); (b) the admission sought was of substantial importance; (c) Vista had no reasonable ground for believing that it might prevail on the matter; and (d) there was no other good reason for Vista's failure to admit the matters presented.

22. To the extent that any of the foregoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into these Conclusions of Law.

IT IS SO ORDERED.

Dated: Dec. 18, 1991.

/s/ Manuel L. Real
HON. MANUEL L. REAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

APPENDIX E

UNITED STATES OF AMERICA
CENTRAL DISTRICT OF CALIFORNIA

No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: February 3, 1992
Time: 10:00 a.m.

ORDER REGARDING DEFENDANT'S MOTION FOR FINDINGS OF FACT AND FOR RELIEF FROM AND AMENDMENT OF THE JUDGMENT

[Filed Feb. 10, 1992]

Defendant Vista Paint Corporation's ("Vista") Motion For Findings Of Fact And For Relief From And Amendment Of The Judgment came on regularly for hearing before the Court on February 3, 1992. Defendant's motion is denominated as one for reconsideration of this Court's prior entry of summary judgment against defendant. The Court has also previously ordered that Vista obtain a stay of execution of the judgment upon certain conditions, such stay to expire on February 3, 1992. After consideration of the moving and opposing papers, exhibits and pleadings, and all arguments submitted to the Court;

IT IS HEREBY ORDERED that:

1. Vista's Motion For Findings Of Fact And For Relief From And Amendment Of The Judgment is denied

in its entirety with prejudice, except as explicitly set forth below.

2. The Court approves and enters amended findings of fact and conclusions of law in the form submitted by the United States.

3. The United States is hereby stayed from executing upon the judgment under the identical conditions as previously imposed by this Court on Vista until February 7, 1992. After consideration of the papers filed in support and in opposition to Vista's prior request for a stay of execution of the judgment, the Court finds that any additional stay should be strictly governed by Fed. R. Civ. Proc. 62(d). Therefore, Vista may extend the stay of execution of plaintiff's judgment provided in this Order pursuant to Rule 62(d) only upon the condition that it post a supersedeas bond in the amount of $3,170,896.00, and that Vista deliver such bond to the Court along with an application for the Court's approval of the bond's amount and its terms of payment to the United States by no later than February 7, 1992.

DATED: 2-3, 1992.

/s/ Manuel L. Real
MANUEL L. REAL
Chief United States District Judge

Submitted by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT H. PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

Date: February 3, 1991
Time: 10:00 a.m.

AMENDED FINDINGS OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

[Filed Feb. 11, 1992]

Plaintiff United States of America's motion for summary judgment came on regularly for hearing on November 18, 1991, Chief United States District Court Judge Manuel L. Real presiding. Subsequently, defendant's Motion For Findings Of Fact and For Relief From And Amendment Of The Judgment came on regularly for hearing on February 3, 1992. After having heard the arguments of counsel and examined the pleadings, memorandum and exhibits presented by the plaintiff and de-

fendants, the Court makes the following amended findings of fact and conclusions of law:

STATEMENT OF UNCONTROVERTED FACTS

1. Vista is a major manufacturer, distributor and retail seller of paint. It manufactures approximately 25,000 gallons of paint each month for sale at its stores in California, and its total sales last year exceeded 50 million dollars. Vista's general office and its sole paint manufacturing plant are located in Fullerton, California. Vista sells its paint at its own stores in Stanton, Costa Mesa, La Habra, Orange, Mission Viejo, Ontario, Riverside, El Cajon, Chula Vista, Huntington Beach, and San Diego, California.

2. In 1984, as part of the State Implementation Plan ("SIP") for California to limit the VOC content of paint, the South Coast Air Quality Management District ("SCAQMD") and the San Diego County Air Pollution Control District ("SDCAPCD") adopted SIP Rules 1113 and 67.0. These rules regulate non-flat architectural coatings, otherwise known as gloss or semi-gloss paints, which are commonly used to paint structures, mobile homes or pavement. In order to control air pollution from the manufacture and application of these coatings, the rules limit their VOC content to no more than 250 grams of VOC per liter of coating ("250 g/l VOC"), and forbid the sale, offer for sale, or application of any such paint exceeding these VOC limitations ("non-complaint coatings").

3. As background, local and regional government authorities under California law have primary responsibility for control of air pollution. Cal. Health & Safety Code § 40000 *et seq.* Two of these local authorities are the SCAQMD, which includes Los Angeles and Orange Counties, and the SDCAPCD, which includes San Diego County. These districts are empowered to adopt rules governing air pollution and to independently enforce them

as state law. Id. at § 40001. As for the federal government, the Clean Air Act ("CAA") provides the EPA with independent authority to enforce federally approved air pollution control laws. Section 110 of the Act, 42 U.S.C. § 7410, requires among other things that each State submit rules for emission limitations to be incorporated into the State Implementation Plan ("SIP"), and enforced as federal law by the EPA. *See* 42 U.S.C. 7413.

4. In 1985, the U.S. Environmental Protection Agency ("EPA"), pursuant to the CAA, approved SCAQMD Rule 1113 and SDCAPCD Rule 67.0 as part of the SIP for California, to be enforced as federal law. 50 Fed. Reg. 3338 (January 24, 1985).

5. Vista's president was aware of these rules and their purpose in the time period between 1985 to 1987, to control VOC emissions. Vista was both a long-time manufacturer and seller of non-compliant coatings, having produced its "Trim-Kote" and "Proformer" brands with VOC's in excess of 250 g/l for over 10 years. Vista offered these non-compliant coatings for sale for the five-year period preceding February 1987.

6. EPA met with industry trade associations in 1987, including the National Paint & Coatings Association and the Southern California Paint & Coatings Association, regarding its strategy for taking enforcement action against companies violating the 1985 VOC limitations set by law. EPA informed the industry that it would, as a matter of enforcement discretion, prioritize enforcement against those companies that did not cease the manufacture of non-compliant coatings by July 1, 1987 *and* who did not cease their sale of non-compliant coatings by September 1, 1987. Thus, while EPA retained the discretion to prosecute any company that violated the VOC limitation after January 24, 1985, EPA announced that those companies that persisted longest in their continuing violations of the Clean Air Act would be the first to be prosecuted.

7. On March 19, 1987, in order to determine the compliance status of the paint industry with the VOC limitations of federal law, EPA issued a request for information to a number of paint manufacturers, including Vista, pursuant to Section 114 of the CAA, 42 U.S.C. § 7414 ("Section 114 Request"). EPA required that each company report the volume of each non-architectural coating that it manufactured from February to May 1987, and the VOC content of each coating. Each company was given until April 7, 1987 to submit their first reports, and warned that non-compliance would subject them to civil penalties.

8. Vista did not respond to EPA's March 19 request. Vista's president cannot recall why Vista did not respond. Faced with Vista's recalcitrance, EPA subsequently issued an Administrative Order against Vista pursuant to Section 113(a)(3) of the CAA, finding that Vista had violated Section 114 of the CAA in failing to provide the requested information to EPA. 42 U.S.C. §§ 7413(a)(3), 7414. Per its Order, EPA directed Vista to disclose by no later than April 16, 1987 the VOC content of the architectural coatings that it manufactured or distributed from February through May 1987.

9. Vista only partially complied with EPA's Administrative Order, responding in a letter postmarked April 20, 1987 by disclosing the VOC content of the architectural coatings it manufactured in February and March 1987, only. Vista's letter disclosed that its monthly paint production was approximately 25,000 gallons of coatings, with 55 percent by volume of the identified coatings exceeding the 250 g/l VOC limitation of federal law. Vista did not respond to EPA's Order regarding its coatings manufactured in April and May, 1987, and did not provide the requested information.

10. EPA subsequently sought more specific information from the paint manufacturers regarding the trade name, volume and VOC content of each non-compliant

coating sold in each California air quality district in March, April and May 1987. On May 15, 1987, EPA sent Vista a modified request for more specific information to supplant its initial request for information. Alternatively, EPA specified that the paint manufacturer could stipulate that it sold and/or offered for sale coatings in violation of the 250 g/l VOC limitation, and the month and location where the non-compliant paint was sold. Vista was advised that a failure to provide the requested information would subject Vista to an enforcement action for civil penalties of $25,000 per day of violation.

11. Vista responded by a letter dated June 12, 1987. Without disclosing the months in which it sold non-compliant coatings, Vista admitted to selling non-compliant coatings in the SCAQMD and the SDCAPCD. Vista's president also confirmed Vista's prior admissions in his sworn deposition testimony. Yet the information regarding the volume of each such non-compliant Vista coating sold and the location of their sale was available to Vista in March, April and May of 1987.

12. Based upon Vista's admission, EPA issued a Notice of Violation of Vista on June 19, 1987 pursuant to Section 113(a)(1) of the CAA.

13. EPA, in its continuing effort to compel Vista to comply with the law, sent Vista a second Section 114 request on June 19, 1987, requesting documentation of any quantities of Vista non-compliant coatings manufactured and sold in the subsequent July-October 1987 period. This request required Vista to (1) establish and maintain records regarding their non-compliant coatings, (2) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (3) report the name and VOC content of the coatings sold; and (4) report the identity of coatings manufactured by Vista from July-October 1987.

14. The information requested by EPA's June 19 Section 114 request was available to Vista at the time of

EPA's request. EPA again warned Vista at that time of the $25,000 per day penalty if the requested information was not received.

15. In an effort to further accommodate the paint industry and Vista, EPA by its letter dated July 22, 1987 modified its second Section 114 request with a strictly tailored condition. In this letter, EPA stipulated that if Vista would commit to (1) the cessation of the manufacture of non-compliant coatings by July 1, 1987, (2) the cessation of all sales of non-compliant coatings by September 1, 1987 (a condition never fulfilled by Vista, see below), and (3) disclose the time and location of sales of non-compliant paint in August 1987 (another condition never fulfilled by Vista), that Vista would be relieved of its obligation to provide the other information requested by EPA in its prior June 1987 letter. Vista was still required to maintain all relevant records of its manufacture and sale of non-compliant coatings. EPA was explicit, however, that all conditions must be strictly complied with if Vista was to be relieved of any of its reporting obligations.

16. Vista continued to manufacture, sell and offer for sale its non-compliant coatings throughout April to October 1987, but did not provide any reports to EPA. Vista continued to manufacture non-compliant coatings in April, May and June of 1987, and continued to sell and offer for sale its non-compliant coatings in the Los Angeles and San Diego areas throughout June, July, August and September 1987. Although Vista continued to sell non-compliant coatings, Vista submitted no report of its August sales as requested in EPA's July 22, 1987 letter, and no report as required by EPA's June 19, 1987 letter. EPA, per the CAA Section 113, 42 U.S.C. § 7413, gave notice to the appropriate State air pollution control agency of this enforcement action.

17. On August 19, 1987, Vista's president, Eddie R. Fisher, telephoned William Wruble of EPA Region IX

to ask for more time to sell his non-compliant coatings. After discussing Vista's situation, Mr. Fisher stated that "he had no choice but to sell the [non-compliant] paint past September 1, and was planning to do so." Mr. Fisher then stated that "he would (could) litigate if he had to, since the option was to go out of business."

18. Mr. Wruble denied Vista's request for additional time to sell its non-compliant coatings, and explained that Vista's failure to take EPA's enforcement authority seriously was not a reason to grant it additional time to sell non-compliant coatings. Mr. Fisher then said that he "didn't think it was our [EPA's] intention to put him in jail, although he'd be willing to pay a 'reasonable' fine to be able to continue to sell his violating coatings."

19. Vista was also warned by the local SDCAPCD to cease its sale of non-compliant coatings by September 1, 1987, a warning Vista received at least by July 28, 1987. Vista however continued to sell non-compliant coatings throughout September 1987. Vista admits that such non-compliant coatings remained offered for sale throughout Vista's San Diego stores in September 1987. Vista also continued its refusal to respond to EPA's request for information.

20. Further evidence that Vista sold non-compliant coatings after September 1, 1987 is provided where inspectors from the SDCAPCD purchased the Vista-brand "Trim-Kote" coating, a non-compliant coating, from Vista's retail outlet on Kearney Villa Road in San Diego, California, on September 2, 1987. The SDCAPCD's laboratory analysis revealed that the purchased paint had a VOC concentration of 387 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

21. The SDCAPCD inspectors purchased a second gallon of non-compliant coating, a Vista paint under the brand name "Proformer", from the same Vista San Diego store on September 22, 1987. The SCPAPCD's laboratory

analysis revealed that the purchased paint had a VOC concentration of 381 g/l, well above the permissible 250 g/l permitted by SDCAPCD Rule 67.

22. Both Vista's records and its president corroborate these violations. Vista's April 16, 1987 report to EPA identifies that its "Trim-Kote" and "Proformer" paints as non-compliant coatings, have a VOC concentration of 240 and 380 g/l, respectively. Vista's president confirmed that Vista's "Trim-Kote" and "Proformer" paints purchased by the SDCAPCD inspectors would be expected to have VOC concentrations in excess of 250 g/l. Mr. Fisher further admits that non-compliant coatings were sold in San Diego on September 2, 1987. Based upon these illegal sales, the SDCAPCD cited Vista with two misdemeanor Notices Of Violation for its violations of SDCAPCD Rule 67. Cal. Health & Safety Code § 42400.

23. Faced in September 1987 with enforcement action from the SDCAPCD (EPA had not yet taken its enforcement action against Vista), Vista sought a variance from the SDCAPCD Hearing Board.

24. As background, the variance procedure is a creation of the California Health & Safety Code §§ 42350 *et seq.*, and provides the applicant with a procedure to obtain relief from a *local* rule (not a federal rule) under certain strictly limited conditions. Cal. Health & Safety Code § 42350. In part, an applicant cannot obtain a variance unless the applicant attests that it "is, or will be, in violation of Section 41701 or of any rule, regulation, or order of the district." Cal. Health and Safety Code § 42352(a). Thus, by applying for a variance, Vista further admitted that it was in violation of SDCAPCD Rule 67 and/or its intent to violate that Rule for the express purpose of selling the remainder of Vista's non-compliant paints within the next 90 days.

25. Vista was subsequently unable to persuade a majority of the SDCAPCD Hearing Board at its September 24, 1987 hearing that a variance was warranted, and Vista obtained no variance relief at any time from the SDCAPCD. Vista applied to the SDCAPCD Hearing Board for reconsideration, then dropped its request. Vista represented instead that it had removed its non-compliant paint from its San Diego stores as of October 12, 1987, but after the September 24 variance hearing. Vista's president explains that he removed the non-compliant coating from his San Diego stores because those coatings were not selling well. Vista subsequently paid a fine to the SDCAPCD for its violations of their local rules.

26. Vista offered for sale a significant amount of non-compliant coatings in San Diego in September 1987. At the SDCAPCD Hearing Board September 24, 1987 hearing, Vista's president testified under oath, as required by Cal. Health & Safety Code § 40830, that 13,000 gallons of non-compliant paint remained in Vista's San Diego stores. Vista's president corroborated this admission when he told SDCAPCD inspector George Seidel prior to the hearing that during September 1987, Vista had 5200 gallons of non-compliant paint for sale in Vista's San Diego stores. Until Vista's variance was lost, Vista continued to offer this paint for sale in violation of the SIP.

27. The VOC's emitted by Vista's paint are a primary precursor of ozone, or smog, which the EPA has designated as a major air pollutant. 42 U.S.C. §§ 7408, 7450, 7451; 40 C.F.R. ¶¶ 50.1, 50.9. The 13,000 gallons of coating offered for sale in September 1987 in San Diego by Vista would release approximately eight tons of VOC hydrocarbons.

28. Ozone pollution causes serious adverse health effects, including coughing, reduced lung capacity, respiratory infection and possible permanent lung damage.

There is also evidence that the young, the elderly, and those persons with respiratory ailments (such as asthmatics) are among those who are particularly susceptible to the adverse effects of ozone. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness and headaches. Due to its irritation nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. At higher concentrations [of ozone], hospitalization becomes a possibility.

29. Ozone also causes significant damage to the environment, where ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering. Moreover clear evidence shows that ozone damages economically, ecologically, and aesthetically important plants. When exposed to ozone, major annual crops produce reduced yields. Some tree species suffer injury to needles or leaves, lowered productivity, and in severe cases, individual trees can die.

30. EPA has through the federal Clean Air Act attempted to control and regulate VOC emissions from a variety of sources, including paint manufacturers. In 1987, EPA found that 40 paint companies, including Vista, were in violation of the federal Clean Air Act's limitation on VOC concentrations in their coatings. All 40 paint companies received a Notice Of Violation, and 38 announced their intent to cease non-compliant paint sales. Only one company announced its intent to continue to violate the VOC restrictions, to intentionally violate the law despite repeated warnings from the regulatory agencies, and to disregard the effects of its violations on human health and the environment: that company was Vista.

31. After EPA referred this matter to the U.S. Justice Department for enforcement action, Vista for the first time produced a letter it purportedly prepared on or about August 4, 1987 and sent to EPA, that represented that Vista had ceased its manufacture of non-compliant coatings on June 30, 1987, and "will not offer for sale any non-compliant coatings after September 1, 1987."

32. This representation has in fact proven to be false. Vista's president admits that sales of such coatings continued well after September 1, 1987. In addition, there is no copy of the letter in EPA's files or any other indication that it was received by EPA prior to the date it was produced to the U.S. Department of Justice in 1989. Vista's president testified that he cannot recall ever seeing the purported Vista August 4, 1987 letter before 1989 when it was first produced to the U.S. Department of Justice.

33. Vista appears to have had no intention of ceasing its sale of non-compliant coatings in August 1987, where Vista's president announced to EPA at precisely the same time that Vista would continue its sales of non-compliant paint after September 1, 1987, and Vista in fact did so. Vista's president said that Vista would go bankrupt if it could not sell its non-compliant paint, a statement that again cannot be reconciled with Vista's purported August 1987 letter.

34. The United States propounded interrogatories and requests for production of documents on May 1, 1991, seeking this identical information requested by EPA in 1987. Vista responded with groundless objections with no legal basis, and flatly refused to provide the information or produce the relevant documents. The United States then brought a motion to compel Vista to comply with its discovery requests. As a result, this Court ordered that Vista first specifically identify by September 27, 1991 the quantity of its non-compliant coatings manufactured and

sold in 1987, and second produce the requested documents at the U.S. Attorney's Office by no later than October 25, 1991, again mirroring the information requested by EPA in 1987.

35. Vista did not identify its non-compliant coatings with a verified response per this Court's Order and as required by Section 114 of the Clean Air Act, but instead directed the United States to look through unidentified documents at its warehouse. Moreover, Vista has refused to make those documents available for inspection until October 25, 1991.

36. Vista has already provided its sworn response stating unequivocally that no documents exist regarding its sale or offer for sale of non-compliant coatings prior to August 30, 1987. *See* Vista's "Supplemental" Responses No. 2 and 3. This unexplained disappearance of Vista's documents is directly contrary to EPA's Section 114 requirement that Vista retain those documents.

37. Vista sworn responses to the United States' Requests for Admission ("RFA") cannot be reconciled with the deposition testimony of Vista's president, where he admits precisely the same facts that Vista denies in its RFA responses. For example, Vista's president admits that he knew that Vista was selling non-compliant coatings in September 1987. Fisher Depo. p. 188. *But see* Vista RFA No. 27. There are numerous other examples. *See* Vista RFA Nos. 1, 2, 3, 5, 6, 7. *See* especially Vista's evasive response to RFA No. 13, 14.

38. In the only information Vista has ever revealed about its sales of non-compliant paint in September 1987, Vista asserts that after September 1, 1987 it sold 35 gallons of non-compliant paint from one store, the identical store where SDCAPCD inspectors purchased non-compliant Vista paint after September 1, 1987. However, Vista has never revealed the total sales of non-compliant paint in all of its San Diego stores after Sep-

tember 1, 1987, and pointedly has continued its pattern of obstruction and evasion in this litigation by refusing to admit even its sales of this 35 gallons of paint. *See* RFA No. 17 and Vista's response.

There is no genuine issue of material fact remaining in this case.

40. To the extent that any of the following Conclusions of Law are deemed to be uncontroverted facts, they are incorporated into these Statement of Uncontroverted Facts.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355, and personal jurisdiction over the parties herein.

2. Venue in this district is proper pursuant to 42 U.S.C. 7413 and 28 U.S.C. § 1391(c).

3. Liability for violations of Sections 110 and 114 of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7410, 7414, is strict, pursuant to CAA Section 113, 42 U.S.C. § 7413.

4. Vista is a corporation covered by the CAA, 42 U.S.C. § 7602(e).

5. EPA satisfied the requirement that notice of this action be given to the appropriate State air pollution control agency pursuant to the CAA, 42 U.S.C. § 7413.

6. Vista illegally offered for sale and sold non-compliant coatings a VOC content in excess of 250 g/l during the time period between and including December 3, 1985 through October 12, 1987 in violation of the State Implementation Plan rules identified as SCAQMD Rule 1113 and SDCAPCD Rule 67, and continued to violate those rules more than 30 days after having received a Notice of Violation from EPA on June 24, 1987.

7. Vista has therefore violated Section 110 and 113 of the Clean Air Act, 42 U.S.C. §§ 7410, 7414, from December 3, 1985 to October 12, 1987, a total of 578 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

8. Vista illegally and unreasonably failed to respond to EPA's June 19, 1987 request for relevant information in violation of Sections 113 and 114 of the CAA, 42 U.S.C. §§ 7413, 7414, by its failure to (a) establish and maintain records regarding their non-compliant coatings, (b) report the volume of non-compliant coatings sold in August-October 1987 and their location of sale; (c) report the name and VOC content of the coatings sold; and (d) report the identity of coatings manufactured by Vista from July-October 1987.

9. Vista has therefore violated Sections 113 and 114 of the Clean Air Act from August 26, 1987 to November 18, 1991, a total of 1177 days of violations, and there being no genuine issue of material fact remaining, the United States is entitled to summary judgment thereon.

10. Section 113 of the CAA, 42 U.S.C. § 7413(b), provides for imposition of a civil penalty against Vista of not more than $25,000 per day of violation for (1) the sale or offer for sale of non-compliant VOC paint in violation of CAA Section 110, and (2) for the failure to respond to EPA's request for information in violation of CAA Section 114. 42 U.S.C. § 7413(b)(2), (4). For purposes of computing the appropriate civil penalty, the penalty period begins when the source first commits the violation, and not later when the NOV is issued. This Court will first determine the maximum penalty allowable, and then consider any mitigating circumstances.

11. In determining the civil penalty, the court "should give effect to the major purpose of a civil penalty: deterrence. Civil penalties should be large enough to hurt, and

to deter anyone in the future from shown as little concern as [defendant] did for the need to comply.

12. The CAA was amended in November 1990, in part, to add new CAA Section 113(e)(1), 42 U.S.C. § 7413(e)(1). In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider (1) the size of the business; (2) the economic impact of the penalty on the business; (3) the seriousness of the violation; (4) the violator's full compliance history and good faith efforts to comply; (5) the duration of the violation as established by any credible evidence; (6) payment by the violator of penalties previously assessed for the same violation; (7) the economic benefit of noncompliance, and such other factors as justice may require.

13. The first two factors, the size of Vista's business and the economic impact of the penalty on its business, support the imposition of a substantial penalty. Vista is a major manufacturer, distributor and retail seller of paint, with its total sales last year exceeding 50 million dollars. Vista owns its manufacturing facilities in Fullerton, California, its own stores in 15 different locations in California, and its own trucks and transportation facilities for its business operations. Imposition of the penalty assessed below would amount to approximately six per cent of Vista's sales in a single year of operation.

14. The third factor, the seriousness of the violation, also supports a substantial penalty against Vista. After more than two years of illegally selling non-compliant coatings and after a Notice Of Violation, Vista continued to manufacture and sell its non-compliant coatings at a rate of 11,300 gallons per month. The excess VOC's added to the environment by manufacturing this paint are significant; by applying these non-compliant paints, the excess VOC's added to the environment above that permitted by law is approximately 16,000 lbs, or eight tons a month. During the total period between December 3, 1985 and October 12, 1987, the application of Vista

paints has thereby added approximately 176 tons of excess VOC's to the environment over that permitted by law. Given the devastating effects on human health, vegetation and our environment of such unpermitted pollution, the potential harm of Vista's conduct is almost incalculable, where Vista has contributed to the injuries from air pollution suffered by the population of Los Angeles, Orange and San Diego Counties.

15. Vista's failure to respond to EPA's request for information is equally serious. More than four years after the information was requested by EPA, then by the U.S. Department of Justice in this lawsuit, Vista has not yet responded to EPA's request that Vista specify the quantity of non-compliant paint manufactured and sold in the summer of 1987.

16. There is injury to the public when responsible parties such as Vista do not respond to official inquiries pertaining to its Clean Air Act compliance and liability. EPA must expend a significant portion of its limited monies to prosecute these actions, and the violator escapes effective regulation of its pollution by hiding its violation and challenging EPA to find the information on its own, if it can. Where the regulatory program is designed to protect public health, as with the Clean Air Act, it is even more important to deter violators.

17. The fourth and fifth factors, the violator's full compliance history, good faith efforts to comply, and the duration of the violation as established by any credible evidence, also supports a substantial penalty against Vista. Vista's CAA violations were persistent evidence an extended history of deliberate non-compliance. *See, e.g.* Conclusion Of Law ¶¶ 7, 9. Vista's conduct was calculated to violate the law, and was intentional, knowing. and in bad faith. Moreover, while other paint manufacturers accepted EPA's offer of leniency in exchange for their compliance with the law, Vista literally dared EPA

to enforce the law, and then refused to disclose the evidence of its violations. Vista conduct has been consistent throughout this case, and establishes a pattern of knowing disregard for the law. Deterrence of Vista from the knowing, deliberate and calculated violation of the environmental laws requires imposition of these civil penalties.

18. The sixth factor, the payment by the violator of penalties previously assessed for the same violation, has been considered, where Vista has made no prior payment to plaintiff for its violations of federal law, and where it has made a $500.00 payment on a $2000.00 penalty imposed by the San Diego Air Pollution Control District for Vista's violations of its Rule 67.0 occurring on September 2 and 22, 1987.

19. The seventh factor, the economic benefit of noncompliance, also supports a substantial penalty against Vista. By its failure to properly respond to EPA's Section 114 requests for information or to the United States' discovery in this case, Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of non-compliant coatings. Based upon the record before the Court as detailed in the Court's Findings Of Fact, the Court concludes that Vista obtained a significant economic benefit from its illegal offer for sale and sales of non-compliant coatings. See Findings Of Fact ¶¶ 1, 9. Moreover, Vista has failed to submit admissible evidence to controvert the United States' showing of Vista's significant economic benefit.

20. The Court has considered all other mitigating factors, and has reduced Vista's civil penalty accordingly.

21. Regarding Vista's CAA Section 110 violations, the Court assesses a civil penalty of $1,000 per day for each of Vista's 468 days of violations from December 3, 1985 to June 24, 1987 (the date Vista received its Notice of Violation from EPA), and $12,500 per day for each

of Vista's 110 days of violation from June 24, 1987 to October 12, 1987. The total CAA Section 110 civil penalty is $1,843,000.

22. Regarding Vista's CAA Section 114 violations, the Court assesses a civil penalty of $1,000 per day for each day of Vista's 1177 days of violation from August 26, 1987, the date Vista's first response to EPA's June 19, 1987 request for information was due, to November 18, 1991, the hearing date on the United States' summary judgment motion. The total CAA Section 114 civil penalty is $1,177,000.

23. In addition, Vista shall be required to pay the reasonable attorney's fees and expenses of the United States pursuant to Federal Rule Of Civil Procedure 37(c) in making its proof of the matters denied in Vista's Responses to Plaintiff's First Set Of Requests For Admissions, dated March 29, 1991, where (a) the requests were not held objectionable pursuant to Rule 36(a); (b) the admission sought was of substantial importance; (c) Vista had no reasonable ground for believing that it might prevail on the matter; and (d) there was no other good reason for Vista's failure to admit the matters presented.

24. To the extent that any of the forgoing Uncontroverted Facts are deemed to be conclusions of law, they are incorporated into these Conclusions of Law.

IT IS SO ORDERED.

Dated: Feb. 11, 1992

/s/ Manuel L. Real
HON. MANUEL L. REAL
Chief United States District Judge

Presented by:

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
SCOTT PARK
Assistant United States Attorney

/s/ Peter Hsiao
PETER HSIAO
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55160
D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR-POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

ORDER

[Filed Feb. 17, 1993]

Before: TANG and HALL, Circuit Judges, and WALKER,* District Judge

Appellees' petition for rehearing is hereby DENIED.

---

* The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

APPENDIX H

UNITED STATES OF AMERICA
FOR THE NINTH CIRCUIT

No. 92-55160

D.C. No. CV-90-6449-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

VISTA PAINT CORPORATION,
Defendant.

VISTA PAINT CORPORATION,
Counterclaimant-Appellant,

v.

UNITED STATES OF AMERICA,
Counterdefendant-Appellee.

VISTA PAINT CORPORATION,
Third-Party Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY; SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT; SAN DIEGO AIR POLLUTION CONTROL DISTRICT; AIR RESOURCES BOARD; TECHNICAL REVIEW GROUP;
Third-Party Defendants-Appellees.

ORDER

[Filed Mar. 22, 1993]

Before: TANG and HALL, Circuit Judges, and WALKER,* District Judge.

The panel has voted to deny appellant's petition for partial rehearing. Judges Tang and Hall have voted to reject the suggestion for partial rehearing en banc and Judge Walker has so recommended.

The full court has been advised of the suggestion for partial rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for partial rehearing is DENIED and the suggestion for partial rehearing en banc is REJECTED.

---

* The Honorable Vaughn R. Walker, United States District Court Judge for the Northern District of California, sitting by designation.

Supreme Court, U.S.
FILED
AUG 05 1993
OFFICE OF THE CLERK

(3)

No. 92-2026

In the Supreme Court of the United States

OCTOBER TERM, 1993

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

4 pp

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2026

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari was filed out of time. The judgment of the court of appeals was entered on September 24, 1992, Pet. App. 2a, and the federal parties filed a timely petition for rehearing on October 8, 1992, C.A. Record, 10/8/92 Entry, which was denied on February 17, 1993. Pet. App. 59a-60a. Petitioner filed a petition for rehearing on October 13, 1992, beyond the 14 days allowed by Fed. R. App. P. 40(a). C.A. Record, 10/13/92 Entry. That petition for rehearing was denied on March 22, 1993. Pet. App. 61a-62a.

Supreme Court Rule 13 provides that "if a petition for rehearing is *timely* filed in the lower court by any party

in the case, the time for filing the petition for a writ of certiorari for all parties * * * runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment" (emphasis added). Accordingly, the time to file a petition for certiorari in this case expired on May 18, 1993, which was 90 days from the denial on February 17, 1993, of the United States' timely petition for rehearing. Since the petition for certiorari was filed on June 21, 1993, it is out of time, and this Court lacks jurisdiction over the case. *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *Citizens Bank* v. *Opperman*, 249 U.S. 448, 450 (1919).

Petitioner's filing of an untimely petition for rehearing in the court of appeals had no effect on the time within which to file a petition for certiorari. As this Court explained in *Pfister* v. *Finance Corp.*, 317 U.S. 144, 150 (1942):

> where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts—if any are offered—support, grounds for opening the original order and determines that no grounds for a reëxamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order.

Accord *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940); *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U.S. 206 (1952). In denying petitioner's untimely petition for rehearing, the court of appeals simply stated that "[t]he panel has voted to deny [petitioner's] petition for partial rehearing." Pet. App. 62a. Nothing in the court's order suggests that the court did more than determine that the petition failed to set forth grounds for reexamination of the original order. See *Pfister*, 317

U.S. at 150. Thus, the court of appeals' denial of petitioner's untimely petition for rehearing did not operate to enlarge the time for filing a petition for certiorari.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

AUGUST 1993

(2)

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 92-2026

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VISTA PAINT CORPORATION,
Petitioner,
v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE & SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases	Page
Bowman v. Loperena, 311 U.S. 262 (1940)	4
Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991)	4
Missouri v. Jenkins, 495 U.S. 33 (1990)	3
Pfister v. Finance Corp., 317 U.S. 144 (1942)	4
U.S. v. Aguilar-Correa, 953 F.2d 558 (9th Cir. 1992)	2
Federal Rules	
Federal Rules of Appellate Procedure	
Rule 25(a)	2, 3
Rule 40(a)	2
Rule 40(b)	2, 3
Rules of the United States Court of Appeals for the Ninth Circuit	
Rule 31-2	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2026

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S REPLY BRIEF

Petitioner Vista Paint Corporation hereby replies to arguments first raised in the brief in opposition to certiorari.

Respondents United States of America and Environmental Protection Agency argue in opposition solely that Vista's petition for rehearing in the Ninth Circuit was filed "out of time" and "untimely" and that, therefore, the pendency of that petition in that court did not enlarge the time for filing a petition for certiorari in this Court.[1]

---

[1] The other three respondents by letters filed in advance of the government's opposition waived the filing of any formal opposition but purported to concur in the government's anticipated filing.

The government's argument is based on the following factual assertion and record citation: "Petitioner filed a petition for rehearing on October 13, 1992, beyond the 14 days allowed by Fed. R. App. P. 40(a). C.A. Record, 10/13/92 Entry."

The government's factual premise is incorrect and its apparent legal assumptions are erroneous. Vista's petition for rehearing was timely filed in the Ninth Circuit on October 8, 1992.

Rule 40(a) of the Federal Rules of Appellate Procedure provides, in relevant part, that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is . . . enlarged . . . by local rule." Rule 40(b) thereof provides that a petition for rehearing shall be in a form, and copies shall be served and filed, as prescribed by the federal rules relating to briefs. Rule 25(a) thereof provides, in relevant part, that ". . . briefs . . . shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail . . . is utilized." Ninth Circuit Rule 31-2 "relat[es] to time for service and filing of briefs." *U.S. v. Aguilar-Correa,* 953 F.2d 558, 559 (9th Cir. 1992). Rule 31-2 includes Rule 31-2.1(c), which provides: "In all cases, first class mail shall be deemed to be the most expeditious form of delivery by mail. (See FRAP 25(a).)" A petition for rehearing is a "brief" within the meaning of Rule 31-2. *Aguilar-Correa*, 953 F.2d at 559. A requirement of Rule 31-2 ". . . applies as much to a brief petitioning for rehearing as to any other brief." *Id.*

The government acknowledges that the filing of its own petition for rehearing, allegedly on October 8, 1992, was "timely." Vista's petition for rehearing was deemed filed on the same day. Vista deposited in first class mail on October 8, 1992 its petition under cover of a letter of its counsel, dated October 8, 1992, stating that Vista's petition for rehearing was "[e]nclosed for filing." (See

letter from Elizabeth Kauffman to Clerk, United States Court of Appeals, Ninth Circuit, dated October 8, 1992, lodged with the Clerk of the Court.) The proof of service by mail attached to Vista's petition declared, under penalty of perjury, in relevant part, as follows:

> "PETITIONER claims the privilege of Rule 25(a), Federal Rules of Appellate Procedure: '. . . briefs shall be deemed filed on day of mailing if the most expeditious form of delivery by mail . . . is utilized'; Ninth Circuit Rule 31-2.1(c): '. . . first class mail shall be deemed to be the most expeditious form of delivery by mail'; Rule 40(b), Federal Rules of Appellate Procedure: '. . . copies [of the Petition] shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs.'" C.A. Record, 10/13/92 Entry.[2]

The entry on the Ninth Circuit's docket on which the government relies specifically noted that Vista's petition had been "served on 10/8/92." The Ninth Circuit, itself, deems Vista's petition to have been filed timely on October 8, 1992. (See letter from Senior Deputy Clerk of the United States Court of Appeals for the Ninth Circuit to Christopher G. Foster, Esq., dated August 12, 1993, lodged with the Clerk of the Court, which states, in part "[i]n summation, your petition was timely filed under the rules and procedures as applied by this court.")[3]

---

[2] The government conceded the timely filing of Vista's petition in a letter to the Ninth Circuit dated March 2, 1993 in which it stated "[o]n September [sic] 7 and 8, 1992, the appellant and appellee filed petitions for rehearing from this Court's unpublished decision in the above-referenced case." This statement not only admits the timeliness of Vista's petition but also demonstrates the government's adoption of the provisions of Rule 25(a) of the Federal Rules of Appellate Procedure with respect to the filing of its own petition. C.A. Record, 3/16/93 Entry.

[3] This Court defers to the Circuit Courts in matters relating to interpretation and treatment of petitions for rehearing filed therein. *Missouri v. Jenkins*, 495 U.S. 33, 46-50 (1990).

Accordingly, Vista's petition was filed timely on October 8, 1992 under the above rules.[4]

For these reasons, Vista's petition for rehearing in the court below and petition for certiorari here were timely and, for the reasons set forth in Vista's petition for certiorari, which is otherwise unopposed, certiorari should be granted.

Respectfully submitted,

WILLIAM M. SMILAND
Counsel of Record
DONNELLY, CLARK, CHASE
& SMILAND
Twelfth Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioner

Dated: August 13, 1993.

---

[4] Even if the petition for rehearing had been filed late in the Ninth Circuit, it may still have tolled the time period applicable herein. In *Bowman v. Loperena*, 311 U.S. 262, 266 (1940), a case cited by the government, the Court stated that "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." The government cites *Pfister v. Finance Corp.*, 317 U.S. 144, 150 (1942), however, for the proposition that an out-of-time petition for rehearing, where the original order is not reexamined, does not enlarge the time for review of the original order. The government goes on to state, without any citation, that "[n]othing in the court's order suggests that the court did more than determine that the petition failed to set forth grounds for reexamination of the original order." But there is nothing in the Ninth Circuit's denial of Vista's petition for rehearing that suggests that the court did not reexamine the original order in reaching its conclusion to deny the petition. *Cf., Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) ("[A] summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case.").

Supreme Court, U.S.
FILED
SEP 22 1993
OFFICE OF THE CLERK

No. 92-2026

In the Supreme Court of the United States

OCTOBER TERM, 1993

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

JACQUES B. GELIN
J. CAROL WILLIAMS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

21 pp

TABLE OF AUTHORITIES

Cases:	Page
Action for Rational Transit v. *West Side Highway Project*, 699 F.2d 614 (2d Cir. 1983)	12
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	15
Buckeye Power, Inc. v. *EPA*, 481 F.2d 162 (6th Cir. 1973)	13
General Motors Corp. v. *United States*, 496 U.S. 530 (1990)	6
Getty Oil Co. v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973)	13
Indiana & Michigan Electric Co. v. *EPA*, 509 F.2d 839 (7th Cir. 1975)	13
Lloyd A. Fry Roofing Co. v. *EPA*, 554 F.2d 885 (8th Cir. 1977)	12-13
Lubrizol Corp. v. *EPA*, 562 F.2d 807 (D.C. Cir. 1977)	12
New Mexico Environmental Improvement Div. v. *Thomas*, 789 F.2d 825 (10th Cir. 1986)	14
Saunders v. *Shaw*, 244 U.S. 317 (1917)	15
Sierra Club v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983)	14
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975)	6
Union Electric Co. v. *EPA*, 515 F.2d 206 (8th Cir. 1975), aff'd, 427 U.S. 246 (1976)	13
Union Electric Co. v. *EPA*, 593 F.2d 299 (8th Cir.), cert. denied, 444 U.S. 839 (1979)	13
United States v. *Aguilar-Correa*:	
953 F.2d 558, order withdrawn, 965 F.2d 772 (9th Cir. 1992)	3
965 F.2d 772 (9th Cir. 1992)	4
United States v. *Ethyl Corp.*, 761 F.2d 1153 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986)	12

Statutes and rules: Page

Administrative Procedure Act, 5 U.S.C. 706 13
Clean Air Act, 42 U.S.C. 7401 *et seq.* 5
§ 109(a), 42 U.S.C. 7409(a) 5
§ 110, 42 U.S.C. 7410 (1988 & Supp. III 1991) 8, 9
§ 110(a)(1), 42 U.S.C. 7410(a)(1) (Supp. III 1991) 6
§ 110(a)(2), 42 U.S.C. 7410(a)(2) (Supp. III 1991) 6
§ 110(a)(2)(E), 42 U.S.C. 7410(a)(2)(E) (Supp. III 1991) 12
§ 110(k)(1)(B), 42 U.S.C. 7410(k)(1)(B) (Supp. III 1991) 6
§ 113, 42 U.S.C. 7413 (Supp. III 1991) 8, 9
§ 113(a)(1), 42 U.S.C. 7413(a)(1) (Supp. III 1991) 6, 8
§ 113(b), 42 U.S.C. 7413(b) 8, 9
§ 113(e), 42 U.S.C. 7413(e) (Supp. III 1991) 8, 10, 14, 15
§ 113(e)(1), 42 U.S.C. 7413(e)(1) (Supp. III 1991) 11
§ 114, 42 U.S.C. 7414 (1988 & Supp. III 1991) 8, 9
§ 116, 42 U.S.C. 7416 ..... 6, 7
§ 307, 42 U.S.C. 7607 (Supp. III 1991) 13, 14
§ 307(b), 42 U.S.C. 7607(b) (Supp. III 1991) 11
§ 307(b)(1), 42 U.S.C. 7607(b)(1) (Supp. III 1991) . 6, 7, 12, 13
§ 307(b)(2), 42 U.S.C. 7607(b)(2) (Supp. III 1991) 7, 12
Fed. R. App. P.:
Rule 25(a) 2, 3, 4, 5
Rule 28 2
Rule 31 2
Rule 31(a) 2, 3
Rule 31(b) 2
Rule 32 2
Rule 40 2
Rule 40(a) 5
Rule 40(b) 2, 3
Fed. R. Civ. P.:
Rule 52(b) 10
Rule 59(a) 10
Rule 60(b) 10
Ninth Circuit Rules:
Rule 31-1 4
Rule 31-2 ..... 3, 4

Rules—Continued: Page

Rule 31-2.1(c) 3, 4
Rule 31-2.3(b) 3
Rule 35 4
Rule 40 4

Miscellaneous:

44 Fed. Reg. (1979):
p. 8202 5
pp. 8202-8204 6
50 Fed. Reg. 3338 (1985) 7
54 Fed. Reg. 5236 (1989) 7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2026

VISTA PAINT CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

---

1. Petitioner claims (Pet. Reply 2) that, contrary to the government's assertion, see Memo. in Opp. 2-3, the petition for a writ of certiorari in this case is not out of time because the petition for rehearing to the Ninth Circuit was timely filed. Petitioner argues that, under the Federal Rules of Appellate Procedure and the Rules of the Ninth Circuit as interpreted by that court, a petition for rehearing is deemed filed as of the time it is deposited in first class mail. Petitioner notes that the petition for rehearing was mailed to the Ninth Circuit on October 8, 1992, which was within the 14-day period allowed for the filing of a petition for rehearing from the final judgment in this case.

The sources upon which petitioner relies do not support the contention that a petition for rehearing is filed when mailed. Petitioner points to Subsection (b) of Fed. R. App. P. 40, entitled "Petition for Rehearing," which states that copies of a petition for rehearing "shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs." Rule 31(b), entitled "Number of Copies to be Filed and Served," deals exclusively with the number of copies of briefs to be filed with the court and served on counsel, and is silent with respect to the time for filing a brief. That subject is addressed separately in Rule 31(a), to which Rule 40 does *not* refer. Moreover, neither Rule 40 nor Rule 31 speaks to the method by which various types of papers are deemed filed with the court. That question is separately addressed in Fed. R. App. P. 25(a), which states that "filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing [using] the most expeditious form of delivery."

The category of "briefs," which are deemed filed upon mailing under Rule 25(a), does not include petitions for rehearing. The appellate rules treat petitions and briefs as distinct by establishing separate rules that incorporate different procedures for each type of filing. Compare Rules 28, 31, 32 with Rule 40. The fact that Rule 40(b), in prescribing the number of copies of petitions for rehearing to be filed, refers to the parallel rule (Rule 31(b)) for briefs, does not demonstrate that a petition for rehearing is a brief, or that the categories overlap under the rules. Rather, the use of separate sections (Rule 31(b) and Rule

40(b)) for briefs and petitions to address the same issue—the number of copies of the document to be filed—leads to the opposite conclusion.

Petitioner also suggests (Pet. Reply 2) that the rules of the Ninth Circuit establish that a petition for rehearing is filed on the day it is mailed first class. The circuit court rules to which petitioner refers do not support that proposition. Circuit Rule 31-2, which cites both Fed. R. App. P. 25(a) and 31(a), establishes requirements for serving and filing briefs. However, nothing in the text of the Rule indicates that the category of "briefs" to which it repeatedly refers includes petitions for rehearing.[1] Like the

---

[1] Petitioner claims (Pet. Reply 2) that, under the Ninth Circuit's decision in *United States* v. *Aguilar-Correa*, 953 F.2d 558, 559 (1992), "[a] petition for rehearing is a 'brief' within the meaning of [Circuit] Rule 31-2." Therefore, petitioner argues, a first class mailing operates as a filing of a petition under the terms of Circuit Rule 31-2.1(c), which provides that "[i]n all cases, first class mail shall be deemed to be the most expeditious form of delivery by mail. (See FRAP 25(a))." Petitioner's argument is based on a misreading of *Aguilar-Correa*. In that case, the Ninth Circuit deemed untimely a government motion for an extension of time to file a petition for rehearing on the authority of Circuit Rule 31-2.3(b), which states that a motion for an extension of time "shall be filed at least 7 days before the expiration of the time prescribed for filing the brief." See 953 F.2d at 559. Thus, *Aguilar-Correa* stands for the limited proposition that, for the purpose of determining when an application for an extension of time to file a petition for rehearing must be filed, the Ninth Circuit will apply the rule for briefs under Circuit Rule 31-2.3(b). The court's decision to use that rule can be explained by the fact that the question of when a motion for an extension of time to file a petition for rehearing is due is not independently addressed in the federal or Ninth Circuit rules. In contrast, the point at which a petition for rehearing is considered filed—

federal rules, the Ninth Circuit rules deal with briefs and petitions for rehearing in separate sections, compare Circuit Rules 31-1 and 31-2 with Circuit Rules 35 and 40. None of these rules expressly modifies the application to petitions for rehearing of the statement in Fed. R. App. P. 25(a) that, save for briefs and appendices, papers are deemed filed with a court of appeals upon arrival. See Circuit Advisory Committee Note to Rules 35-1 to 35-3 (under the heading "Time for Filing," stating only that a petition for rehearing must be filed "within 14 days after the filing of the original disposition" without addressing when a petition is deemed filed). Since the

---

upon arrival at the court—is fixed by Fed. R. App. P. 25(a), and neither *Aguilar-Correa* nor the text of Circuit Rule 31-2 alters that rule. In any event, the order in *Aguilar-Correa* was withdrawn by the Ninth Circuit less than five months after it was issued, see 965 F.2d 772 (1992), and thus no longer has precedential force.

Even if, as petitioner argues, a petition for rehearing could be considered a "brief" for all purposes under Circuit Rule 31-2, the text of Subsection 2.1(c) of that rule would not establish, as petitioner suggests, that a petition for rehearing is filed when mailed. Referring to Fed. R. App. P. 25(a), Subsection 2.1(c) states that "in all cases, first class mail shall be the most expeditious form of delivery by mail." That statement does no more than define the type of mailing that shall be considered the "most expeditious form of delivery" within the meaning of Fed. R. App. P. 25(a). It does not alter or expand the categories of papers that may be deemed filed by that method, which, under Rule 25(a), include only "briefs and appendices." As we have explained, however, the term "briefs" as used in the federal appellate rules does not include petitions for rehearing. Thus, Ninth Circuit Rule 31-2.1(c) does not alter the federal appellate rule that petitions for rehearing are filed when delivered to the court.

Ninth Circuit rules do not effectively "enlarge" the time allocated for filing a petition for rehearing, see Fed. R. App. P. 40(a), nor modify the filing procedures, the federal appellate rules must control. Under those rules, petitioner's petition for rehearing was filed when received, not when mailed. Fed. R. App. P. 25(a). Since the petition was docketed as filed on October 13, 1992, beyond the 14 days allowed under Fed. R. App. P. 40(a), it was out of time, and so was the petition for a writ of certiorari. See Memo. in Opp. 1-2.

2. Although we believe that, under the federal and circuit court rules, the petition for rehearing in this case was not timely filed, the question nevertheless remains whether this petition was presented to the court of appeals as timely by the Clerk of the Ninth Circuit so as to raise the possibility that the court denied the petition on the merits (and not for untimeliness). See Memo. in Opp. 2; Pet. Reply 4 n.4. Because the letter lodged by petitioner with this Court creates some uncertainty on this point (see letter of August 12, 1993, from the Senior Deputy Clerk of the Ninth Circuit, Jereldine Curtis, to Christopher Foster, counsel for petitioner), we will address the issues raised in the petition in the remainder of this brief.

a. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*,[2] requires the Administrator of the Environmental Protection Agency (EPA) to publish National Ambient Air Quality Standards (NAAQS) for air pollutants. 42 U.S.C. 7409(a). On February 8, 1979, the EPA approved a NAAQS for ozone, 44 Fed. Reg. 8202 (1979), a substance that results from the interac-

[2] All references to the Clean Air Act will be to the Act as it currently stands unless otherwise indicated.

tion between substances such as volatile organic compounds (VOCs) and sunlight. One of the principal sources of VOC emissions is paint solvent evaporation. See generally *id.* at 8202-8204. As part of its scheme to establish "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution," *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990), the CAA provides for each State to submit to the EPA a plan to implement and maintain the National Ambient Air Quality Standards. 42 U.S.C. 7410(a)(1). The EPA is required to approve the state implementation plan (SIP) if it comports with the Act. 42 U.S.C. 7410(a)(2) and (k)(1)(B). See generally *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-67 (1975). The Act also authorizes a State to propose SIP revisions and requires the Administrator to approve them if certain requirements are met. 42 U.S.C. 7410(a)(1), (a)(2), and (k)(1)(B). See *General Motors Corp.* v. *United States*, 496 U.S. at 533.[3] Once a SIP or SIP revision is approved by the EPA, it is enforceable by the EPA as federal law. 42 U.S.C. 7413(a)(1).

b. Section 307(b)(1) of the Act provides for judicial review of, among other actions, the Administrator's promulgation of any NAAQS or approval of a SIP or SIP revision. 42 U.S.C. 7607(b)(1). The Act provides that petitions to review such actions must be filed in the court of appeals within 60 days after the date on which notice of the promulgation or approval appears

---

[3] Under the Act, States retain authority to adopt air pollution control standards or limitations that are more stringent than those established by federal law. 42 U.S.C. 7416.

in the *Federal Register*. 42 U.S.C. 7607(b)(1). The Act specifically provides that:

> Actions of the Administrator with respect to which review could have been obtained under paragraph (1) [by way of petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

c. Under California law, local and regional authorities have primary responsibility for establishing state law controls on air pollution. In 1984, two of these local authorities, the South Coast Air Quality Management District (South Coast District) and the San Diego County Air Pollution Control District (San Diego District), adopted rules regulating the VOC content of non-flat architectural coatings offered for sale or sold in containers larger than one liter. These rules were submitted to the EPA, which approved them as a part of the California SIP on January 24, 1985. 50 Fed. Reg. 3338 (1985).

Subsequently, the South Coast District and the San Diego District adopted more lenient rules governing the VOC content of non-flat architectural coatings and submitted them to the EPA for approval. See 54 Fed. Reg. 5236 (1989). However, since these rules were more lenient than the VOC content rules approved in 1985, they were unenforceable by the State unless approved by the EPA. 42 U.S.C. 7416. The EPA rejected the more lenient South Coast District VOC limitation on February 2, 1989. See 54 Fed. Reg. 5236 (1989). The San Diego revision expired by its own terms on September 1, 1986. See Gov't C.A. Br. App. 2.

d. The CAA authorizes the EPA to impose civil penalties on private companies for violations of the Act's air quality standards and also authorizes penalties for failure to comply with requests for information concerning possible violations. See Sections 110, 113, and 114 of the CAA, 42 U.S.C. 7410, 7413, and 7414.[4] In 1987, the EPA decided to take enforcement action against companies not in compliance with the VOC limitations in the South Coast and San Diego Districts. To determine the company's compliance status, the EPA issued requests for information in March 1987 and May 1987 to petitioner Vista Paint Corporation, Pet. App. 23a-24a, a long-time manufacturer of VOC-containing coatings. Petitioner responded to the first, March 19 request only after the EPA issued an administrative order requiring it to do so. In that letter, the company admitted that it was selling paint that did not comply with the VOC limitations. After the EPA determined that petitioner's response to the information requests was inadequate, the EPA issued a Notice of Violation to the company under Section 113(a)(1) of the Act, 42 U.S.C. 7413(a)(1). Pet. App. 24a. The EPA then sent an additional request for information on June 19, 1987. In a letter sent a month later, the EPA informed petitioner that certain information in its June request did not have to be submitted if petitioner: (1)

---

[4] In November 1990, one month before the EPA filed a civil action in this case, the Act was amended to add a new Section 113(e), 42 U.S.C. 7413(e), which expands the number of factors the court must consider in assessing civil penalties for noncompliance with the Act. Cf. Pet. App. 33a-34a (old Section 113(b), 42 U.S.C. 7413(b)(1988)) with Pet. 3 (text of new Section 113(e)).

ceased manufacture of non-complying paint by July 1, 1987; (2) agreed to cease all sales of non-complying coatings by September 1, 1987; and (3) disclosed the time and location of sales of non-complying paint in August 1987. *Id.* at 25a. Petitioner did not provide the requested reports to the EPA, but continued to sell and offer for sale non-complying paint until at least October of 1987. *Id.* at 25a-28a.

e. On December 3, 1990, the United States brought this enforcement action under Sections 110, 113, and 114 of the CAA, 42 U.S.C. 7410, 7413, and 7414, for civil penalties of $25,000 for each day that petitioner failed to comply with the EPA's information requests and sold or offered paint for sale in violation of the VOC limits. C.A. E.R. (ER) 5. Petitioner then filed a third-party complaint against the EPA, the South Coast District, the San Diego District, the Air Resources Board, and the Technical Review Board (ER 36-56) and a counterclaim against the United States (ER 31-34), claiming that the VOC SIP limitations were invalid under state law. Both the third-party complaint and the counterclaim were dismissed for lack of subject matter jurisdiction and for failure to state a claim. ER 58-61.

f. Following full briefing and a hearing, the district court granted the government's motion for summary judgment. Pet. App. 20a-37a. The district court considered the factors bearing on the amount of the penalty under the previous version of Section 113, including "the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. 7413(b) (1988); Pet. App. 33a-35a. The court then imposed a civil penalty of $1,000 per day for each of the 468 days that

petitioner sold paint in violation of the VOC standards prior to petitioner's receipt of the notice of violation on June 24, 1987, and a $12,500 per day penalty for each of the 110 days that petitioner was in violation of the Act's sale and reporting requirements, from June 24, 1987, to October 12, 1987, for a total penalty of $1,843,000. Pet. App. 35a. The district court also assessed a civil penalty of $1,000 per day for each of the 1177 days that petitioner was in violation of the EPA's subsequent, June information request, for a total of $1,177,000. *Id.* at 36a.

g. Relying on Fed. R. Civ. P. 52(b), 59(a), and 60(b), petitioner then filed a pleading styled "Motion for Findings of Fact and for Relief From and Amendment of the Judgment" in which it requested, *inter alia*, that the district court reexamine the penalties in light of the factors contained in the new Section 113(e) of the Act, which had been added to the Act effective November 1990. On February 11, 1992, the district court issued amended findings of facts and conclusions of law in which it affirmed its grant of summary judgment in favor of the government. Pet. App. 40a-58a. The court refused to reduce the amount of the penalties based on consideration of the Section 113(e) factors. Specifically with respect to the factor of "the economic benefit of noncompliance," the court found, based on facts in the record, that petitioner "obtained a significant economic benefit from its illegal * * * sales of non-compliant coatings." Pet. App. 56a. The court also held that petitioner had "failed to submit admissible evidence to controvert the United States' showing of [petitioner's] significant economic benefit." *Ibid.*

h. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-12a. In relevant part, the court affirmed the dismissal for lack of jurisdiction of the third-party complaint and counterclaim challenging the validity of the VOC limitations. Pet. App. 3a. The court of appeals noted that petitioner had "ample opportunity" to submit comments to the State on the local rules and to challenge the EPA's approval of the SIP provisions under Section 307(b) of the CAA. Pet. App. 3a. The court of appeals also affirmed the district court's finding of petitioner's liability for selling and offering for sale non-compliant paint and the failure to provide requested information. *Id.* at 3a-5a. However, as to the penalty, the court of appeals found that disputed factual issues precluded summary judgment as to some of the factors that a court is required to consider under new Section 113(e)(1), including the economic impact of the penalty, the company's good faith efforts to comply, the seriousness of the violation, and the reasonableness of EPA's inaction on the proposed SIP revisions that were ultimately rejected or expired. Pet. App. 5a-10a. With respect to the remaining Section 113(e) factors, the court of appeals upheld the district court's determination that no reduction of the penalty was warranted based on the facts as found in the record. Pet. App. 6a-11a.

3. The court of appeals correctly upheld the district court's dismissal for lack of jurisdiction of petitioner's claims that the VOC regulations were invalid because inconsistent with state law. The courts of appeals uniformly hold that a party may not assert the invalidity of CAA regulations in an enforcement proceeding based on grounds that could

be considered by the Administrator in deciding whether to approve the regulations or by the court of appeals in reviewing the Administrator's action under Section 307(b)(1). See, *e.g.*, *United States* v. *Ethyl Corp.*, 761 F.2d 1153, 1155-1158 (5th Cir. 1985), cert. denied, 474 U.S. 1070 (1986); *Action for Rational Transit* v. *West Side Highway Project*, 699 F.2d 614, 616 (2d Cir. 1983) (per curiam); *Lubrizol Corp.* v. *EPA*, 562 F.2d 807, 813-815 (D.C. Cir. 1977). Under this rule, petitioner's third-party claims and defenses based on state law were properly dismissed, because the issue that petitioner sought to raise—whether the VOC regulations comply with state law—is one that the Administrator is authorized to consider in deciding whether to approve the VOC regulations. The Administrator's authority in this area is established by the CAA provision requiring that States submitting implementation plans to the EPA provide necessary assurances that they will have adequate authority under state law to carry out the plan. 42 U.S.C. 7410(a)(2)(E). Had petitioner sought review of the Administrator's approval of the VOC SIP provisions under Section 307(b)(1), the court could have considered petitioner's claim that the VOC SIP provisions were contrary to state law. That claim is therefore barred in this enforcement action.

There is no merit to petitioner's contention (Pet. 18-19) that the court of appeals' jurisdictional ruling conflicts with decisions of other courts of appeals, because the decisions on which petitioner relies all accept the general proposition that Section 307(b)(2) bars review of issues that a court of appeals could consider in reviewing the Administrator's decision to approve a SIP. Thus, in *Lloyd A. Fry Roofing Co.* v.

EPA, 554 F.2d 885, 892 (8th Cir. 1977), the court held that the plaintiff could not attack the constitutional validity of an approved SIP in an enforcement action because he could have raised that objection in a Section 307(b)(1) proceeding to review the Administrator's approval of the plan. The court explained that the court of appeals could consider the constitutional validity of the decision in the course of its determination whether the Administrator's decision was "in accordance with the law" under the Administrative Procedure Act, 5 U.S.C. 706. In *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 173 (6th Cir. 1973), and *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 845 (7th Cir. 1975), the courts ruled that a party could raise claims of economic or technological infeasibility in an enforcement action because those factors are not properly considered by the Administrator in evaluating a SIP, or by a court of appeals as a basis for setting aside an approved plan on review under Section 307(b)(1). See *Union Electric Co.* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), aff'd, 427 U.S. 246, 265-267 (1976); see also *Union Electric Co.* v. *EPA*, 593 F.2d 299, 300 (8th Cir.), cert. denied, 444 U.S. 839 (1979).[5] In

[5] In *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 355-356 (3d Cir. 1972), cert. denied, 409 U.S. 1125 (1973), the court refused to allow the defendant oil company to raise "the questions of economic hardship or lack of compelling necessity" as a defense in an enforcement action, holding that it could have raised those issues "in a section 307 hearing." 467 F.2d. at 357. To the extent there is any inconsistency between *Getty Oil* and the decisions in *Buckeye Power* and *Indiana & Michigan Electric*, it is over the issue of whether economic hardship can be raised in a Section 307 action. There is no disagreement over the basic principle that a party is barred from raising in an enforcement action any questions that a court of appeals could

contrast with *Buckeye Power* and *Indiana & Michigan Electric*, the claim in this case is not one of technological or economic infeasibility, but rather of the invalidity of the VOC regulations under state law —an issue that the Administrator can consider and the court of appeals can review in a Section 307 proceeding. Thus, the court of appeals correctly affirmed the district court's dismissal of petitioner's claims and defenses of invalidity.[6]

4. Petitioner maintains (Pet. 17, 23) that it was denied "any real opportunity to litigate the new Section 113(e) issues" because the courts below "refused to consider" evidence offered by petitioner concerning the Section 113(e) factors. Although the court of appeals agreed with the district court's statement that some of the evidence offered by petitioner in the post-judgment proceedings was inadmissible, see, *e.g.*, Pet. App. 8a-9a,[7] the district court did not grant the government any opportunity to present evidence or arguments in the post-judgment proceedings that was not also available to

---

consider in reviewing the Administrator's decision in a Section 307 proceeding.

[6] The court of appeals' decision is not in conflict with *New Mexico Environmental Improvement Div.* v. *Thomas*, 789 F.2d 825, 833 (10th Cir. 1986), or *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983). See Pet. 19. These cases hold that a successful challenge to a SIP in state court renders the plan unenforceable in state and federal court. Here, by contrast, these VOC SIP provisions have never been challenged in state court and, consequently, have never been declared invalid.

[7] Petitioner does not challenge the evidentiary rulings directly, nor does it offer any explanation as to why those rulings might be incorrect. See Pet. 12-18.

petitioner. Thus, petitioner's complaint is, at bottom, an objection to the district court's findings of fact and to its analysis of the Section 113(e) factors in light of the evidence properly in the record. See Pet. App. 54a-57a. These fact-bound evidentiary claims do not warrant this Court's review. In any event, to the extent that petitioner objects to the district court's analysis in its ruling on the post-judgment motion, its arguments are not properly before this Court because petitioner failed to present the arguments to the court of appeals, and the court of appeals declined to consider them. See Pet. App. 11a (Petitioner "never expressly argued in its opening brief that the district court erred in denying its post-judgment motion. Even in its reply brief, [petitioner's] arguments were, at best, unclear.")

There is also no merit to petitioner's contention (Pet. 20-23) that the court of appeals' decision conflicts with *Saunders* v. *Shaw*, 244 U.S. 317 (1917), and *Armstrong* v. *Manzo*, 380 U.S. 545 (1965). In *Saunders* v. *Shaw*, 244 U.S. at 319, this Court held that an intervening bondholder was deprived of his right to due process of law when he was precluded by various court rulings from ever offering evidence at trial. In this case, in contrast, the district court held a hearing on the government's motion for summary judgment and a hearing on petitioner's post-judgment motion, and petitioner had ample opportunity to present evidence at both of these proceedings. In *Armstrong* v. *Manzo*, 380 U.S. at 552, the Court reversed the lower court judgment on the ground that a father failed to receive notice of a child support hearing and that a second hearing with notice failed to cure the original defect. The Court held that "an opportunity

[to be heard] must be granted at a meaningful time and in a meaningful manner." Petitioner in this case had two meaningful opportunities to be heard before the district court. No further review of these claims is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MYLES E. FLINT
Acting Assistant Attorney General

JACQUES B. GELIN
J. CAROL WILLIAMS
Attorneys

SEPTEMBER 1993